

Chapter 14

The Relationship Between Citizen and Government: The Citizen as Taxpayer

In 1974, the Congress made all Federal agencies subject to a broad set of restrictions regarding the uses and disclosures that can be made of records they maintain about individuals. Section 3(b) of the Privacy Act of 1974 permits a Federal agency to disclose information about an individual without his consent only if one of eleven conditions is met.² As the Commission has pointed out in Chapter 13, however, it believes that no one set of rules applicable to all Federal agencies can suffice in all instances. Effective disclosure policy must make special provision for the confidentiality of the records of particular Federal agencies through enactment of statutes that set disclosure policy for a single agency, or for the records generated in a particular type of relationship an individual may have with one or more agencies. Records that contain a great amount of detail about individuals or that must be held in strict confidence if individuals are to be induced to participate in a government undertaking deserve special attention in this regard.

The Internal Revenue Service and the records it maintains about taxpayers represent such a special case. Although the taxpayer volunteers most of the information the IRS needs, his disclosures to it cannot be considered voluntary because the threat of criminal penalties for failure to disclose always exists. The fact that tax collection is essential to government justifies an extraordinary intrusion on personal privacy by the IRS, but it is also the reason why extraordinary precautions must be taken against misuse of the information the Service collects from and about taxpayers.

In June 1976, the Commission recommended the enactment of a

² These conditions are met when a disclosure is: (1) to officers and employees of the agency [maintaining the record] on a "need to know" basis; (2) required under the Freedom of Information Act; (3) for a "routine use" [a "use of the record for a purpose compatible with the purpose for which it was collected"]; (4) to the Bureau of the Census, for activities related to censuses and surveys; (5) to recipients who have provided assurance that the record will be used solely as a statistical research or reporting record, and the record is transferred in other than individually identifiable form; (6) to the National Archives; (7) to a Federal, State, or local agency for use in an authorized law enforcement activity; (8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual; (9) to a committee of Congress in connection with matters within its jurisdiction; (10) to the Comptroller General; and (11) pursuant to the order of a court of competent jurisdiction.

Federal statute more stringent with respect to disclosures of records made by the IRS than either the Privacy Act of 1974 or the confidentiality provisions of the Internal Revenue Code (IRC) then in force. The recommended statute would constitute the Service's sole authority to disclose its records about individuals to other Federal agencies and to agencies of State government. The Congress enacted a statute similar in many respects to the one recommended by the Commission as Section 1202 of the Tax Reform Act of 1976 [P.L. 94-455].

The Commission believes that its 1976 recommendations for IRS disclosure policy can serve as an example of the kind of particularized disclosure statutes the Congress should enact for certain types of government records that deserve or require special confidentiality protections. The Commission also believes that the rationale for its 1976 IRS recommendations which is articulated here and in an appendix volume on Federal tax return confidentiality, exemplifies the kind of considerations that should be taken into account in enacting any Federal confidentiality statute. Although the Congress, in enacting Section 1202 of the Tax Reform Act, did not reach the same conclusions as the Commission in every detail, the Commission approves without reservation the process by which the disclosure was formulated—enactment of a statute by the Congress with opportunities for public comment and participation in its deliberations.

THE PRIVACY COMMISSION MANDATE

The Privacy Act of 1974 required the Privacy Protection Study Commission to report to the President and the Congress on

whether the Internal Revenue Service should be prohibited from transferring individually identifiable data to other [Federal] agencies and to agencies of State governments. [*Subsection 5(c)(2)(B)(ii) of P.L. 93-579*]

After conducting public hearings and a review of policies and practices regarding Federal tax return confidentiality, the Commission, as noted above, made an interim report to the President and to the Congress in June 1976 in which it recommended special constraints on IRS disclosure of individually identifiable data to other Federal agencies and to State and local government agencies.

The Commission believes that to satisfy its statutory obligation to reflect and report on questions of Federal tax return confidentiality it must take account of the 1976 changes in the law governing disclosure of tax returns and related information and consider the need for further recommendations. Accordingly, this chapter compares the Commission's earlier recommendations with the modifications contained in the Tax Reform Act of 1976.

In addition, the Commission has reconsidered two interim recommendations that were not intended to be final. One concerned the Department of Health, Education, and Welfare's Parent Locator Service (PLS), which had begun to operate only a short time before the Commission's interim

report was released. The Commission reserved judgment on IRS disclosures to the PLS until it could see how the PLS would perform. The other concerned information about a taxpayer provided to the IRS by "third-party sources" (i.e., persons other than the taxpayer himself). The issue demanding resolution was whether the same disclosure standards should apply to third-party source information as to information provided by a taxpayer about himself. To help answer that question, the IRS agreed to monitor disclosures of both taxpayer-supplied and third-party source data for a three-month period beginning April 1, 1976. The Commission's interim report was completed before the Commission had the results of this monitoring, so a final judgment on the third-party source issue was deferred.

In considering its recommendations for further legislative change, this chapter also takes note of criticisms made by Federal agencies of the 1976 restrictions on the disclosure of taxpayer data for non-tax purposes.

THE IRS DISCLOSURE PROBLEM

The reasons for congressional and public concern about the widespread use of Federal tax information by government agencies other than the IRS, and for purposes unrelated to tax administration, have been well documented.³ While the Congress long ago recognized the sensitivity of information obtained and retained for purposes of Federal tax administration, it had nonetheless, in 1910, designated tax returns as "public records" and given to the President and the Secretary of the Treasury broad discretion in making them available to other agencies and persons.

The disclosure to other government agencies of information about individual taxpayers has increased steadily since 1910. In most instances, new uses of such information were authorized administratively and without any real opportunity for public debate. Federal and State agency recipients of the information met criticisms of their uses of it by asserting that the information was essential to the performance of their particular government functions. In the face of such pleas, it was difficult for IRS administrators to deny them access, and in a substantial number of cases they did not.

The abuses that inevitably resulted were from time to time brought to the attention of the Congress and the public, sometimes dramatically. The Nixon Administration allegedly used tax returns to harass its political adversaries, and an announcement early in the 1970's that information about individual taxpayers would be made available to the Department of Agriculture to aid in statistical analysis aroused intense controversy. Allegations that special powers of the Internal Revenue Service were being misused to collect information for purposes well beyond tax administration but related to other law enforcement activities eventually led to a series of Congressional hearings on the propriety of various uses of tax information.⁴ They led in turn to the mandate in the Privacy Act of 1974 given the

³ See, e.g., Administrative Conference of the United States, *Report on Administrative Procedures of the Internal Revenue Service*, Senate Document 94-266 (October 1975) at pages 821 et seq.

⁴ See, for example, *Federal Tax Return Privacy*, Hearings before the Subcommittee on

Commission and, two years later, to the restrictions embodied in the Tax Reform Act of 1976.

THE RATIONALE FOR THE COMMISSION'S RECOMMENDATIONS

Federal tax administration depends in large measure on the power of government to compel its citizens to disclose information about themselves, and the existence of special investigative authority. The Commission's mandate did not require it to study the administrative structure of tax administration in detail, although in sections of Chapter 9 the Commission has in a general way examined issues of fairness arising in that context.

Some argue that because the IRS uses government resources to collect tax information, such information should be treated as a generalized governmental asset, and that such generalized use does not constitute a material violation of any interest of the taxpayer because the information belongs to the Federal government. The only disclosure constraint needed, say the proponents of this view, is to assure that the information is used only in pursuit of legitimate government objectives.

The Commission emphatically rejects these arguments for two reasons. First, the individual taxpayer is inherently at a disadvantage vis-a-vis a government agency that has access to IRS information about him because the IRS has the threat of serious punishment to compel the disclosure of information the individual would otherwise not divulge. That fact alone, in the Commission's view, argues in general for carefully controlled dissemination of IRS data on individual taxpayers and in most cases for no dissemination. It is understandable that other agencies with important responsibilities want to use information the IRS has authority to collect but they have not, in fact, been vested with the IRS's authority to compel such information from the taxpayer.

Second, the Commission believes that the effectiveness of this country's tax system depends on the confidentiality of tax returns and related information. While no one has tried to measure how the knowledge that other Federal and State agencies can inspect tax returns affects an individual taxpayer, the Commission believes that widespread use of the information a taxpayer provides to the IRS for purposes wholly unrelated to tax administration cannot help but diminish the taxpayer's disposition to cooperate with the IRS voluntarily. This is not to say that the taxpayer will decline to cooperate, but that his incentive to do so may be weakened. Such a tendency in itself creates a potentially serious threat to the effectiveness of the Federal tax system.

The Commission believes that authorizing the IRS to disclose individually identifiable tax information to another agency for a purpose unrelated to the

Administration of the Internal Revenue Code of the Committee on Finance, U.S. Senate, 94th Congress, 1st Session; *Proposals for Change in the Administration of the Internal Revenue Laws*, Hearings before the Oversight Subcommittee of the Ways and Means Committee, U. S. House of Representatives, 94th Congress, 1st Session; *IRS Disclosure*, Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U. S. Senate, 93d Congress, 1st Session.

administration of a Federal tax law is seldom defensible unless the Congress would be willing in principle to compel individuals to disclose the same information directly to the agency requesting it from the IRS. Even then, however, the agency seeking the information should still have to demonstrate a compelling societal need that disclosure of tax information to it by the IRS would fulfill.

SCOPE OF THE COMMISSION'S RECOMMENDATIONS

The Commission restricted the scope of its study to individually identifiable information about individuals. The decision is consistent with the scope of the Privacy Act and its mandate to the Commission. The Commission did not inquire into issues regarding disclosure of IRS information about corporations and other business entities. While the recommendations in this chapter do not apply to disclosure of these other kinds of information, they do apply to the *individually identifiable* data about individuals in the tax returns of business entities.

As prescribed by the Privacy Act, the Commission further restricted its study of IRS disclosure to disclosures to agencies of Federal and State government. It did not inquire into the propriety of IRS disclosures to the President and to the Congress, nor has it formulated standards for determining how much access to tax information the public should have. Nonetheless, the Commission notes with approval that the Tax Reform Act of 1976 creates statutory limitations on the disclosure of individually identifiable tax information to members of the public [*Section 6103(e) of the I.R.C.*], to Committees of Congress [*Section 6103(f) of the I.R.C.*], and to the President and White House staff [*Section 6103(g) of the I.R.C.*].

GENERAL RECOMMENDATIONS

The Commission's interim report proposed general recommendations regarding the manner in which disclosures of tax information without individual consent should be authorized. The general recommendations and the rationale for them are set forth in the Commission's June 1976 interim report. In brief, the Commission recommended:

- (1) that no disclosure of individually identifiable data by the Internal Revenue Service be permitted unless the individual to whom the information pertains has consented to such disclosure in writing or unless the disclosure is specifically authorized by Federal statute;
- (2) that the Congress itself specify by statute the categories of tax information the IRS can disclose and the purposes for which the information can be used, rather than delegate general discretionary authority in this matter to the Commissioner of Internal Revenue or any other representative of the Executive Branch;
- (3) that the IRS be prohibited from disclosing any more individually identifiable taxpayer information than is necessary to

accomplish the purpose for which the disclosure has been authorized, and that the IRS adopt administrative procedures to facilitate public scrutiny of its compliance with this requirement; and

- (4) that recipients of tax information from the Internal Revenue Service be prohibited from redisclosing it without the written consent of the taxpayer, unless the redisclosure is specifically authorized by Federal statute.

The Tax Reform Act of 1976 is consistent in the main with the Commission's general recommendations. Although tax returns were designated as public records prior to the 1976 legislation, Section 6103(a)(1) of the Internal Revenue Code (IRC) provided for inspection of them "... only upon order of the President and under rules and regulations prescribed by the Secretary [of the Treasury] or his delegate and approved by the President." While this language suggested that disclosure should be narrowly restricted, in practice tax return data were disseminated widely throughout the Federal government and to State and local government officials.

The Tax Reform Act of 1976 substantially modified this section of the Internal Revenue Code. The general rule, now established by Section 6103(a) of the Code, is that "Returns and return information shall be *confidential*." (emphasis added) While the Internal Revenue Code, as modified by the Tax Reform Act, authorizes certain disclosures that are not consistent with the Commission's specific recommendations, the Commission regards the substitution of the basic rule of confidentiality for the prior assumption that tax records are public records as a major step forward in controlling the disclosure of tax information.

In enacting the 1976 law, Congress also undertook direct responsibility for determining which disclosures should be permissible. Under prior law, authority to determine the propriety of intragovernmental disclosures was delegated to the Executive branch. In practice, IRS officials had found it hard to deny other agencies and departments access to tax information if it was argued forcefully that such information was essential to the fulfillment of statutory responsibilities. The revised Section 6103 makes confidential treatment mandatory unless disclosure is specifically authorized by Federal statute.

Having established the principle of confidentiality, the Congress, in the Tax Reform Act, listed categories of permissible disclosures of tax information. While the Commissioner of Internal Revenue and the Secretary of the Treasury bear major responsibilities for assuring compliance with the law, and for organizing the administration of permissible disclosures, the Executive branch now has no discretion to permit disclosures of individually identifiable tax information in ways not specifically authorized by the Congress in the Internal Revenue Code. The fact that future disclosures must be specifically authorized by statutory directive provides, in the Commission's view, a valuable check on access to tax information for purposes unrelated to the collection of revenue undertakings.

The revised Section 6103 also limits redisclosure, as the Commission had recommended. It now provides that, except as authorized by statute:

- (1) no officer or employee of the United States;
- (2) no officer or employee of any State or of any local child support enforcement agency who has or had access to returns or return information under this section; and
- (3) no other person (or officer or employee thereof) who has or had access to returns or return information . . . shall disclose any returns or return information obtained by him in any manner . . . [Section 6103(a) of the I.R.C., as amended by the Tax Reform Act of 1976.]

For the first time, the other government agencies that obtain tax information from the IRS are in all cases expressly prohibited by statute from redisclosing it for purposes unrelated to the purpose for which the information was acquired.

The 1976 legislation also took heed of the Commission's recommendation that the IRS be prohibited from ever disclosing any more individually identifiable tax information than is necessary to advance the government objective for which disclosure has been authorized. Nonetheless, there are instances in which the statutory authorizations for disclosure contained in the Tax Reform Act are overly broad in describing the types of information that may be disclosed and the purposes for which the information may be used. These will be discussed below. The Commission strongly reaffirms its commitment to the principle of "limited disclosure" and urges the Internal Revenue Service to respect that principle in implementing the 1976 law.

SPECIFIC RECOMMENDATIONS

DISCLOSURE FOR PURPOSES RELATED TO FEDERAL TAX ADMINISTRATION

The Commission recognizes that almost every use of tax data in any aspect of tax administration is clearly compatible with the purpose for which the information was collected and with the legitimate expectations of the taxpayer. Accordingly, it recommended in 1976 that the IRS be authorized by statute to disclose tax data " . . . to the Department of Justice for use in investigations and prosecutions of violations of tax laws, provided that the information pertains to a party to the actual or anticipated litigation."

On this point, the Tax Reform Act of 1976 provides that:

A return or return information shall be open to inspection by or disclosure to attorneys of the Department of Justice (including United States attorneys) personally and directly engaged in, and solely for their use in, preparation for any proceeding (or investigation which may result in such a proceeding) before a Federal grand jury or any Federal or State court in a matter involving tax administration, but only if—

- (a) the taxpayer is or may be a party to such proceeding

[Section 6103(h)(2)(A) of the I.R.C., as amended by the Tax Reform Act of 1976]

Section 6103(h)(4) of the Internal Revenue Code, as amended by the Tax Reform Act, also specifically authorizes the disclosure of a return "in a Federal or State judicial or administrative proceeding pertaining to tax administration . . . if the taxpayer is a party to such proceeding"

The Commission finds the disclosures authorized in these provisions consistent with its recommendations.

The Commission recommended that some limited disclosure of tax information to the Department of Justice about an individual who is not the object of a tax investigation or prosecution, be authorized but only if " . . . the information disclosed is relevant to issues in an actual or anticipated tax litigation." Moreover, the Commission concluded that "information . . . should be considered relevant only if the treatment of an item on the return of a party to an actual or anticipated tax litigation, or the liability of such a party for

The Tax Reform Act of 1976 authorizes the disclosure to the Justice Department of tax information about individuals not under investigation or prosecution in two situations:

- if . . . the treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding or investigation; or
- such return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding or investigation. *[Section 6103(h)(2)(B) and (C) of the I.R.C., as amended by the Tax Reform Act of 1976]*

Section 6103(h)(4)(B) and (C) authorizes the disclosure of such information in Federal and State judicial or administrative proceedings pertaining to tax administration. The Commission finds the disclosures authorized by these provisions consistent with its recommendations.

The Commission specifically recommended in 1976 that the Congress prohibit access to tax information in two situations involving tax administration. In the past, tax information could be used against witnesses in tax litigation solely for the purpose of impeaching their testimony. The Commission found no justification for this use of tax data unless, of course, the testimony impeached is relevant to the issues in litigation in the ways contemplated by the new Section 6103(h)(4)(B) or (C) of the Internal Revenue Code. While the language of those two sections has not yet been interpreted by the judiciary, both of them authorize disclosure only if the data are "directly related" to an issue or a transaction in the lawsuit. The Commission assumes that these two sections will not be construed as authorizing disclosure solely for purposes of impeachment in ways unrelated to the issues in litigation, and thus finds them consistent with its recommendations.

The Commission, in its interim report, also recommended against the continued use of tax information by government attorneys in connection with the selection of jurors. Tax information has been used to determine whether prospective jurors may be biased against the government because of a previous action against them by the IRS. The Commission found this practice highly inappropriate even with respect to litigation involving the tax laws, especially because counsel almost always has substantial opportunities to discover possible prejudice against the government in a prospective juror directly through *voir dire* procedures.

The Tax Reform Act of 1976 authorizes the use of tax data for jury selection. It provides that:

In connection with any judicial proceeding [involving tax administration] . . . to which the United States is a party, the Secretary [of the Treasury] shall respond to a written inquiry from an attorney of the Department of Justice (including a United States attorney) involved in such proceeding or any person (or his legal representative) who is a party to such proceeding as to whether an individual who is a prospective juror in such proceeding has or has not been the subject of any audit or other tax investigation by the Internal Revenue Service. The Secretary shall limit such response to an affirmative or negative reply to such inquiry. [Section 6103(h)(5) of the I.R.C., as amended by the Tax Reform Act of 1976]

By making limited information regarding jurors available to all parties to the litigation, this provision removes one element of unfairness that obtained under prior laws, which permitted only government counsel to have access to tax data. Nevertheless, the Commission still finds no justification for the use of confidential tax data from IRS files in jury selection, particularly because it is so clearly incompatible with the purpose for which the IRS acquires the information. Whatever value tax information may have in jury selection appears to be marginal, and in any case, the same information can be obtained directly from the prospective juror. Therefore, the Commission reiterates the recommendation in its interim report:

Recommendation (1):

That the Congress prohibit the disclosure of any tax information about a prospective juror for use in jury selection.

DISCLOSURE FOR USE IN ADMINISTERING CERTAIN FEDERAL PROGRAMS

The Commission recommended in 1976 that the IRS be authorized to disclose certain individually identifiable tax data to the Social Security Administration for its use in administering the Social Security Act and the Employee Retirement Income Security Act (ERISA). The Tax Reform Act of 1976 authorizes such disclosures [Section 6103(l)(1) and (5) of the I.R.C., as amended by the Tax Reform Act of 1976] and limits the type of information that may be disclosed and the purpose for which it may be used,

as recommended by the Commission. The Tax Reform Act of 1976 also authorizes the IRS to disclose information to the Department of Labor and Pension Benefit Guaranty Corporation “. . . for the purpose of, but only to the extent necessary in, the administration of titles I and IV” of ERISA [*Section 6103(l)(2) of the I.R.C., as amended by the Tax Reform Act of 1976*]. The Commission believes that all of these disclosures are justified by the statutory and administrative relationship between the income tax laws and, respectively, the Social Security Act and the pension laws.

The Commission also recommended in 1976 that the IRS be authorized to disclose certain tax information to the Railroad Retirement Board in furtherance of the latter's responsibility for administering the Railroad Retirement Act, again because of the interrelationship between tax administration and the administration of railroad retirement benefits. The 1976 legislation provides such authorization [*Section 6103(l)(1)(C) of the I.R.C., as amended by the Tax Reform Act of 1976*]. The Commission finds this provision consistent with its recommendation.

DISCLOSURE TO STATES AND LOCALITIES FOR PURPOSES OF TAX ADMINISTRATION

The Commission, in its interim report, concluded that IRS disclosure of individually identifiable tax information to State tax administrators for use in connection with the administration of the general revenue laws of the States is compatible with the purposes for which information from and about a taxpayer is collected. Such use is also consistent with the need for cooperation between the different levels of government in a federal system, and serves the interest of effective and fair tax administration. Thus, the Commission recommended that the IRS be authorized to disclose individually identifiable tax data to State tax officials, but with certain limitations.

In particular, the Commission recommended against the disclosure of Federal tax information to help a State administer its regulatory or licensing laws even though a license fee—sometimes called a “tax”—may be required as part of the regulatory scheme. The Commission believes that to justify disclosure of tax information to a State, there should be at least a general correspondence between the State tax law for the administration of which the Federal tax information is sought, and the Federal tax law for the administration of which the information was originally collected. In accord with its general recommendation regarding the principle of limited disclosure, the Commission also recommended that disclosures to the States be limited to specified tax returns, the schedules accompanying them, and summary information regarding adjustments thereto, and that such disclosure be permitted only to the extent necessary to determine a taxpayer's liability under a State's general revenue law.

The Tax Reform Act of 1976 specifically authorizes the IRS to continue its disclosures of Federal tax information to State tax collectors in Section 6103(d) of the Internal Revenue Code, as amended by the Tax Reform Act of 1976. This section provides that

returns and return information . . . shall be open to inspection by

or disclosure to any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws, including any procedures with respect to locating any person who may be entitled to a refund.

The Commission is not satisfied that the new law defines the purposes for which it authorizes disclosure to the States carefully enough and regrets that the statute does not specify the particular types of tax information that may be disclosed. The Commission urges the IRS to take care that its disclosures of tax information to the States conform to the principle of limited disclosure.

Although it approves IRS disclosure of Federal tax information to State taxing authorities, the Commission notes that this practice increases the risk of subsequent unauthorized redisclosure of such information. Accordingly, the Commission recommended in 1976 specific statutory requirements calculated to reduce that risk. In particular, it recommended:

- (1) that requests for disclosure be submitted in writing by the principal tax official of the State rather than by the governor;
- (2) that a State receiving tax data have in effect a statute prohibiting the disclosure of information acquired from the IRS and information supplied by the State taxpayer that is a copy of or copied from his Federal return, for purposes other than State tax administration, but that a two year grace period be allowed for enacting such legislation;
- (3) that States receiving Federal tax data institute reasonable physical, technical and administrative safeguards satisfactory to the IRS to reduce the likelihood of unauthorized use or disclosure; and
- (4) that the IRS be specifically empowered to suspend a State's access to Federal tax information, despite the existence of State legislation, if unauthorized disclosures are made or if adequate safeguards have not been established.

Section 6103(a)(2) of the Internal Revenue Code, as amended by the Tax Reform Act of 1976, requires that officers and employees of a State treat IRS tax information as confidential. The 1976 legislation also provides for disclosure of tax information to State taxing officials

only upon written request by the head of such [taxing] agency, body, or commission, and only to the representatives of such agency, body, or commission designated in such written request as the individuals who are to inspect or to receive the return or return information. [Section 6103(d) of the I.R.C., as amended by the Tax Reform Act of 1976]

Another provision contained in Section 6103(d) of the Internal Revenue Code, as amended by the Tax Reform Act of 1976, deters the use

of Federal tax data for political purposes by denying access to the chief executive officer of a State.

The Tax Reform Act also requires States to establish safeguards against unauthorized redisclosures that are satisfactory to the IRS and subject to monitoring by Federal tax officials. Section 6103(p)(4) of the Internal Revenue Code, as amended by the Tax Reform Act of 1976, now conditions continued access to Federal tax information on the maintenance of such safeguards. The Commission finds that these provisions of the Code mitigate the risk of unauthorized redisclosure of Federal tax information once it is in the hands of State officials.

The Tax Reform Act of 1976 does not require States to enact statutes prohibiting disclosure of information acquired from the IRS as well as information supplied to the State by a taxpayer that is a copy of information on his Federal return for purposes other than State tax administration. It does, however, require as a condition of receiving IRS tax information that a State law make statutory provision for confidentiality if its own tax law requires its taxpayers to file copies of their Federal tax returns with their State tax returns. The reason for this requirement is that when the State's file on a taxpayer includes a copy of his Federal tax return or information from it, and also information about him that the State received from the IRS, it would be hard to determine if disclosure of information from the file was or was not an unauthorized disclosure of IRS information. The existence of a State penalty for the unauthorized disclosure of copies of Federal returns acquired by the State from its taxpayers would assure that unauthorized disclosures do not go unpunished because of the difficulty in determining the source of the Federal tax information. The Tax Reform Act's provision in this regard differs from that recommended by the Commission in that it does not require an absolute ban on disclosure of such information for purposes unrelated to State tax administration. Instead, it permits disclosure of copies of Federal tax returns "to another officer or employee" of the State for purposes other than State tax administration. [*Section 6103(p)(8)(B) of the I.R.C., as amended by the Tax Reform Act of 1976*]

The Commission concluded in its interim report that the use of tax information by local revenue authorities is also compatible with the government purpose that justifies the collection of tax information by the Federal government. Accordingly, the Commission recommended in 1976 that State taxing authorities be given authority to use Federal tax information in administering local tax laws, and that the IRS be authorized to disclose certain taxpayer identification and location information directly to local taxing authorities. The Tax Reform Act of 1976 does not authorize any disclosure to local taxing officials, nor does it authorize the use of Federal tax data by State officials in administering local tax law.

The main reason for not authorizing the disclosure for the purposes of local tax administration seems to be the risk of unauthorized redisclosure. The Commission believes, however, that requiring IRS approval of local safeguards and the threat of denying access if safeguards are not adequate mitigate this risk. The Commission notes, moreover, that the Congress in the Tax Reform Act gave local government officials authority to obtain certain

Federal tax information for their use in locating absent parents, despite doubts about the ability of a local government to safeguard Federal tax information.

DISCLOSURE FOR STATISTICAL PURPOSES

When the Commission issued its interim report, it knew of only one Federal agency that had clearly demonstrated its need for individually identifiable tax information about individuals for statistical purposes—the Bureau of the Census. Noting the crucial role administrative records play in statistical analysis, and the stringent statutory restrictions on the disclosure of information by the Census Bureau, the Commission recommended that the IRS be authorized to continue to disclose tax information to the Census Bureau.

The Tax Reform Act is consistent with the Commission's recommendation in that it authorizes the IRS to provide tax data to the Bureau of the Census “. . . for the purpose of, but only to the extent necessary in, the structuring of censuses and national activities authorized by law.” [*Section 6103(j)(1) of the I.R.C., as amended by the Tax Reform Act of 1976*]

The Commission's interim report did not include a recommendation with respect to the Treasury Department's use of individually identifiable data for statistical studies connected with tax policy analysis. The interim report noted, however, that the Commission would approve such disclosure if the Treasury Department can demonstrate its need for *individually identifiable* data for statistical purposes. Section 6103(j)(3) of the I.R.C., as amended by the Tax Reform Act of 1976 authorizes disclosure:

to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for the purpose of, but only to the extent necessary in, preparing economic or financial forecasts, projections, analyses, and statistical studies and conducting related activities.

The Commission recognizes that the purposes described in this section can be interpreted broadly, but finds the disclosures it generally authorizes to be consistent with the Commission's reasons for recommending continued disclosure to the Bureau of the Census. The Commission also notes with approval that, according to the applicable Internal Revenue Code provisions, such disclosures

. . . shall be permitted only upon written request which sets forth the specific reason or reasons why such inspection or disclosure is necessary and which is signed by the head of the bureau or office of the Department of the Treasury requesting the inspection or disclosure. [*Section 6103(j)(3) of the I.R.C., as amended by the Tax Reform Act of 1976*]

Dependence upon written requests with articulated objectives should deter unjustified disclosures.

DISCLOSURE OF INFORMATION ABOUT PROSPECTIVE FEDERAL APPOINTEES

In 1976, the Commission recommended termination of the IRS practice of disclosing tax information about prospective Federal appointees to the White House and to heads of Federal agencies without the consent of the individual to whom the information pertains. The Tax Reform Act, however, endorses current practice by authorizing the disclosure of tax information to:

a duly authorized representative of the Executive Office of the President or to the head of any Federal agency, upon written request by the . . . head of such agency, or to the Federal Bureau of Investigation on behalf of and upon written request by . . . such head, [of] return information with respect to an individual who is designated as being under consideration for appointment to a position in the executive or judicial branch of the Federal Government. *[Section 6103(g)(2) of the I.R.C., as amended by the Tax Reform Act of 1976]*

The Tax Reform Act does, however, limit the information that may be disclosed as follows:

Such return information [about prospective appointees] shall be limited to whether such individual—

- (A) has filed returns . . . for not more than the immediately preceding 3 years;
- (B) has failed to pay any tax within 10 days after notice and demand, or has been assessed any penalty . . . for negligence, in the current year or immediately preceding 3 years;
- (C) has been or is under investigation for possible criminal offenses under the internal revenue laws and the results of any such investigation; or
- (D) has been assessed any civil penalty . . . for fraud. *[Section 6103(g)(2)(A) - (D) of the I.R.C., as amended by the Tax Reform Act of 1976]*

The Commission's reasons for recommending against this practice include: such use is not compatible with the purpose for which the information was originally obtained by the IRS; the same information can be obtained directly from the prospective appointee; an office seeker would be eager to authorize such disclosure if he considered it to be in his interest; and the prospective appointee might have no opportunity to rebut adverse information about himself thus revealed. The 1976 legislation has partially obviated the last of these concerns by requiring that "within 3 days of the receipt of any request . . ., the Secretary [of the Treasury] shall notify such individual in writing that such information has been requested." *[Section 6103(g)(2) of the I.R.C., as amended by the Tax Reform Act of 1976]* While this notification reduces the potential for unfairness somewhat, the Commission still finds the disclosure of tax information without the consent of the prospective appointee neither necessary nor justified.

Accordingly, the Commission reiterates its earlier recommendation:

Recommendation (2):

That the Congress not permit tax information about prospective Federal appointees to be disclosed to the White House and heads of Federal agencies without the consent of the individual to whom the information pertains.

DISCLOSURE TO THE PARENT LOCATOR SERVICE

The Federal Parent Locator Service (PLS) of the Department of Health, Education, and Welfare provides address and place of employment information obtained from Federal agencies to State and local authorities which use this information in locating "absent parents" in order to enforce child-support obligations. The Commission addresses the general issue of the propriety of the policies governing access to various types of information by the Federal and State Parent Locator Services as a separate issue in Chapter 11 of this report.

In its 1976 interim report, the Commission pointed out that despite the obvious propriety of the PLS program, the use of individually identifiable tax information for locating absent parents is obviously not compatible with the purposes for which the IRS was empowered to collect such information. The PLS was then too new for its performance to be assessed, however, and thus the Commission refrained from recommending that tax information be withheld from it. Rather, the Commission recommended:

- (1) that if tax information is to be disclosed for parent location, such disclosure be specifically authorized by Congress;
- (2) that any disclosures so authorized be limited to situations in which residence and employment information may serve to locate individuals against whom outstanding court orders for child support were unsatisfied;
- (3) that there be strict prohibitions against redisclosure of such information by either Federal or State officials; and
- (4) that statutory penalties for unauthorized disclosure be applied in such cases.

The Tax Reform Act of 1976 specifically authorizes the disclosure of tax information in aid of child-support enforcement by providing that:

The Secretary [of the Treasury] may, upon written request, disclose to the appropriate Federal, State, or local child-support enforcement agency—

- (i) available return information from the master files of the Internal Revenue Service relating to the address, filing status, amounts and nature of income, and the number of dependents reported on any return filed by, or with respect to, any individual with respect to whom child-

support obligations are sought to be established or enforced pursuant to the provisions of part D of Title IV of the Social Security Act and with respect to any individual to whom such support obligations are owing; and

- (ii) available return information reflected on any return filed by, or with respect to, any individual described in clause (i) relating to the amount of such individual's gross income . . . or consisting of the names and addresses of payors of such income and the names of any dependents reported on such return, but only if such return information is not reasonably available from any other source. [*Section 6103(l)(6)(A) of the I.R.C., as amended by the Tax Reform Act of 1976*]

The Internal Revenue Code also provides, however, that such disclosures are permissible “. . . only for purposes of, and to the extent necessary in, establishing and collecting child-support obligations from, and locating, individuals owing such obligations.”

The Commission appreciates that the Tax Reform Act of 1976 fulfills one of its recommendations in that the Congress, after considering the question, specifically approved disclosure of IRS records to the PLS. The disclosures authorized by the Tax Reform Act, however, exceed substantially those contemplated by the Commission. Implicit in its 1976 recommendation was the belief that the IRS should be authorized to disclose to the PLS only residence and place of employment information and only for the purpose of locating an individual. The Tax Reform Act authorizes the IRS to disclose to the PLS much more information than necessary to help locate an absent parent, and the Act permits the PLS to use IRS information in calculating the individual's support obligation. Moreover, the Tax Reform Act, in contrast to the Commission's recommendations, authorizes the IRS to disclose to the PLS information regarding the individual to whom support is owed by the absent parent, in addition to information about the absent parent.

The Commission finds a marked qualitative difference between the use of tax information to locate someone and the use of tax information to prove the extent of the individual's liability for child support. Moreover, there are alternative sources of information to prove the extent of liability, including the individual himself, which do not raise the specter of unfettered and unwarranted trespass on the confidentiality of information the absent parent is compelled to give the IRS. In addition, the disclosure of information about the individual to whom support is owed is, in the Commission's view, a totally unjustified incursion into IRS files, given that the individual can be requested to disclose, or authorize the disclosure of, information about himself or herself to State or local child-support enforcement officials. Thus, the Commission recommends:

Recommendation (3):

That Federal tax information authorized to be disclosed to the Parent Locator Service be limited to the minimum necessary to locate an alleged absent parent; that such information be used only in aid of location efforts; and that no disclosures of IRS information about an individual to whom support is owed be permitted without the individual's authorization.

The Commission is further concerned that State and local child-support enforcement officials not make unauthorized redisclosure of information received from the IRS. While the penalties for unauthorized disclosure established by the Tax Reform Act would apply to such officials, and while safeguards to avoid unauthorized disclosure would have to be maintained as mandated by the Act, the Commission urges that special care be devoted by the Federal officials responsible for monitoring child-support enforcement activities to assure that the risk of unauthorized disclosure has been effectively diminished by the penalty and safeguard provisions.

DISCLOSURE TO FEDERAL LAW ENFORCEMENT AGENCIES FOR NON-TAX INVESTIGATIONS AND PROSECUTIONS

The Commission pointed out in its interim report that the use of tax information in non-tax civil and criminal investigations is wholly incompatible with the public finance purposes for which the information was collected, and objectionable on intrusiveness grounds in that it takes advantage of the fact that such information is often provided to the IRS under threat of criminal penalties. The Commission also noted, however, that under applicable statutory and constitutional standards, Federal law enforcement authorities can usually get a copy of a taxpayer's return directly from him. The Commission therefore recommended in 1976 that the IRS be forbidden to disclose tax information for non-tax criminal or civil investigations and prosecutions, except in situations in which the Federal investigator or prosecutor could legally obtain a copy of the return directly from the taxpayer. In sum, *the Commission believes that Federal law enforcement officials should not have easier access to information about a taxpayer when it is maintained by the IRS than they would have if the same information were maintained by the taxpayer himself.*

Consistent with this general position, the Commission recommended in its interim report that a taxpayer be notified of a request for tax information for law enforcement purposes unrelated to tax administration and given an opportunity to oppose the disclosure before a United States District Court. Disclosure would then be authorized by the District Court only if it found:

- (a) probable cause to believe that a violation of civil or criminal law has occurred;
- (b) probable cause to believe that the tax information requested

- from the IRS provides probative evidence that the violation of civil or criminal law has occurred; and
- (c) that no legal impediment to the applicant agency acquiring the information sought directly from the taxpayer exists.

The Commission also recommended that where appropriate, the District Court considering the disclosure request inspect the data *in camera*, and that the District Court be empowered to award litigation costs, including reasonable attorneys fees, to taxpayers who successfully oppose disclosure requests.

The Tax Reform Act of 1976 authorizes disclosures for non-tax criminal (but not civil) investigations. In the case of information provided directly to the IRS by or on behalf of the taxpayer, the Tax Reform Act conditions disclosure upon the issuance of a United States District Court order. Nevertheless, the circumstances outlined in the Tax Reform Act under which the court may order disclosure differ markedly from those the Commission recommended.

The Tax Reform Act provides that:

A return or taxpayer return information shall, pursuant to, and upon the grant of, an *ex parte* order by a Federal district court judge as provided by this paragraph, be open, but only to the extent necessary as provided in such order, to officers and employees of a Federal agency personally and directly engaged in and solely for their use in, preparation for any administrative or judicial proceeding (or investigation which may result in such a proceeding) pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party. [Section 6103(i)(1)(A) of the I.R.C., as amended by the Tax Reform Act of 1976]

The order can only be sought upon the authorization of the Attorney General, Deputy Attorney General, or an Assistant Attorney General, or if the requesting agency is other than the Department of Justice, by the head of the agency. Tax information acquired by a Federal agency pursuant to a court order may be entered into evidence in any administrative or judicial proceeding pertaining to the enforcement of a Federal criminal statute to which the United States or the agency is a party, but only if the court finds that such return or return information is probative of a matter in issue relevant in establishing the commission of a crime or the guilt of a party. [Section 6103(i)(4) of the I.R.C., as amended by the Tax Reform Act of 1976]

The Tax Reform Act of 1976 does not require that the taxpayer be notified of the request; it does not require that the taxpayer be given an opportunity to oppose the disclosure; and all of the proceedings are *ex parte*. The Tax Reform Act further provides for the issuance of the *ex parte* disclosure order by a District Court judge

. . . if he determines on the basis of the facts submitted by the applicant that—

- (i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;
- (ii) there is reason to believe that such return or return information is probative evidence of a matter in issue related to the commission of such criminal act; and
- (iii) the information sought to be disclosed cannot reasonably be obtained from any other source, unless it is determined that, notwithstanding the reasonable availability of the information from another source, the return or return information sought constitutes the most probative evidence of a matter in issue relating to the commission of such criminal act. [Section 6103 (i)(1)(B) of the I.R.C., as amended by the Tax Reform Act of 1976]

To find that the first two conditions exist, the judge apparently needs to conclude only that there is some basis to believe that a crime has been committed and that the information sought may be relevant to the investigation of a crime. Any law enforcement authority conducting any legitimate investigation should be able to satisfy both conditions easily. The third subsection might be read to suggest that law enforcement officers must try to get a copy of the tax return from other sources—probably the taxpayer himself—before they can seek a court order for it. It seems unlikely, in most instances, that a determination of nonavailability from alternative sources could reasonably be made without an attempt to secure the information directly from the taxpayer, the person who is most likely to have a copy of it. Nonetheless, the legislative history of this provision offers no basis for inferring that a Federal law enforcement official would be required to try to obtain a copy of a tax return directly from the taxpayer (or another source) before seeking an *ex parte* disclosure order. Federal law enforcement officers have consistently asserted to the relevant Committees of the Congress and to the Commission itself that notification to the taxpayer of a pending investigation might seriously impair the investigation. The Commission must conclude, therefore, that the third condition required to be found by the court does not require a prior direct approach to the taxpayer.

The 1976 legislation also authorizes disclosure of information that has not been provided to the IRS by or on behalf of the taxpayer for non-tax criminal investigations *without* resort to court order. The IRS may disclose such information on receipt of a written request from the Attorney General, Deputy Attorney General, Assistant Attorney General, or head of an investigating agency other than the Department of Justice setting forth:

- (A) the name and address of the taxpayer with respect to whom such return information relates;
- (B) the taxable period or periods to which the return information relates;
- (C) the statutory authority under which the proceeding or investigation is being conducted; and

- (D) the specific reason or reasons why such disclosure is or may be material to the proceeding or investigation. [*Section 6103(i)(2) of the I.R.C., as amended by the Tax Reform Act of 1976*]

Tax information obtained by a Federal agency pursuant to such a written request may be entered into evidence in any administrative or judicial proceeding pertaining to the enforcement of a Federal criminal statute to which the United States or the agency is a party. [*Section 6103(i)(4) of the I.R.C., as amended by the Tax Reform Act of 1976*]

The legislative history of the Tax Reform Act does not reveal the rationale for distinguishing between a disclosure of information that was provided by or on behalf of the taxpayer and a disclosure of information about the taxpayer provided by another source. The Congress appears to have concluded that Fifth Amendment concerns only arise when information submitted by the taxpayer is used against him in a non-tax criminal investigation. When information is supplied to the IRS by another source, use of it in a non-tax investigation apparently poses no problem. Congress, like the Supreme Court, seems to assume that information in the possession of someone besides the taxpayer cannot be the confidential and protectable information of the taxpayer. As the Commission discovered in its broad inquiry into government access to records about individuals held by third-parties, however, the assumption is incorrect.

Information obtained by the IRS from sources other than the taxpayer is often derived from records which the taxpayer has no choice but to have that other party maintain, such as bank and credit-card records. In essence, such third-party source information is not obtained from an independent source, but from a surrogate without whom the taxpayer could not participate in contemporary society. Frequently, the information maintained by such an agent of the taxpayer illuminates those "intimate areas of personal affairs" that the Fourth and Fifth Amendments are intended to protect from unsupervised inquiry by the executive branch of government. It is exactly such revealing record information that other agencies of government are often anxious to acquire.

Since much of the third-party source information held by the IRS is information supplied from the confidential records of the taxpayer, though the records are in the possession of another party, the Commission believes that such information should be protected by the same standards as information obtained directly from the taxpayer. Two further considerations strengthen this conclusion. First, a good deal of third-party source information is available only because the source is required to keep records about the taxpayer open to inspection by the IRS, or to routinely report information to the IRS for purposes of tax administration. Second, even where there is no compelled reporting or record keeping, the expansive reach of the IRS's administrative summons power permits it to acquire information that other agencies cannot acquire through their ordinary investigative processes. Powers to collect information about an individual and intrude on his privacy were granted for the specific purpose of enforcing the tax law, not as a general device by which any government agency can acquire intimate and revealing details of a taxpayer's activities. For all of

these reasons, the Commission finds no justification for applying less stringent disclosure standards to third-party information than to information supplied by the taxpayer. Therefore it disagrees with the distinction the Tax Reform Act makes in its provisions governing disclosure of information for use in non-tax criminal investigations, and recommends:

Recommendation (4):

That the Congress subject all information about a taxpayer to the same restrictions on disclosure for non-tax investigations and prosecutions that the Commission recommended in its interim report.

While disagreeing with certain aspects of the 1976 law, as indicated above, the Commission believes that the actions taken by the Congress to limit disclosures for non-tax criminal law enforcement are salutary. The Commission is, however, concerned that information disclosed properly for purposes of tax investigation and litigation will be used by the recipient agencies for non-tax criminal law enforcement in ways not consistent with the new restraints in the Tax Reform Act of 1976.

In January, 1977, the IRS promulgated Temporary Regulations⁵ implementing the disclosure provisions of the Tax Reform Act that at best seem ambiguous as to the non-tax uses to which the Justice Department may put tax information they have received from the IRS for purposes relating to tax administration. Section 404.6103(h)(2)-1(a)(1) of the Temporary Regulations provides for the use of tax information originally disclosed to the Department of Justice in connection with "a matter involving tax administration" in " . . . any . . . proceeding . . . also involving the enforcement of a related Federal criminal statute which has been referred by the Secretary [of the Treasury] to the Department of Justice." There is no mention of a court order for such supplementary uses of the tax data, as specified in the Tax Reform Act's amendment to section 6103(i) of the Internal Revenue Code. Other portions of the Temporary Regulations [Section 404.6103(h)(2)-1(a)(2)] open the door wider by authorizing the Justice Department to use information conveyed under the provisions of the Tax Reform Act permitting disclosures for tax administration in a non-tax proceeding or investigation that " . . . involves or arises out of the particular facts and circumstances giving rise to the proceeding (or investigation)" relating to tax administration or to a matter involving the enforcement of a Federal criminal statute referred to the Justice Department by the Secretary of the Treasury.

These regulations seem to permit the use of tax information in joint investigations and prosecutions of non-tax as well as tax violations. The language of the regulations is, however, sufficiently vague to allow for the use of tax information for non-tax criminal law enforcement even where there is not a joint investigation or prosecution. It would seem, therefore, that the Temporary Regulations provide an easy way to avoid the Tax Reform Act's restrictions on the disclosure of tax data for non-tax criminal

⁵ 42 *Federal Register* 16 (January 25, 1977), pp. 4437-40.

law enforcement. The Commission believes that the Temporary Regulations may be inconsistent with the spirit and substance of the 1976 restrictions contained in the Tax Reform Act, and with the Commission's recommendations. Accordingly, the Commission urges that the Temporary Regulations be reevaluated to consider whether these regulations do indeed violate the restrictions imposed by the Tax Reform Act on the use of tax data for non-tax investigations and prosecutions.

SAFEGUARD REQUIREMENTS FOR RECIPIENT FEDERAL AGENCIES

The Commission is concerned that Federal agencies receiving tax information from the IRS are not always fully cognizant of the importance of guarding against unauthorized disclosures of such information. The Commission therefore recommended in 1976 that the IRS, experienced in protection of its records, be empowered to require recipient Federal agencies to institute reasonable administrative, technical, and physical safeguards satisfactory to the IRS to avoid the unauthorized use or disclosure of tax information.

The Tax Reform Act of 1976 prescribes a series of safeguards and vests substantial powers to enforce them in the Federal tax officials. It provides that recipient Federal and State agencies “. . . shall, as a condition of receiving returns or return information [from the IRS]—

- (A) establish and maintain, to the satisfaction of the Secretary [of the Treasury], a permanent system of standardized records with respect to any request, the reason for such request, and the data of such request made by or of it and any disclosure of return or return information made by or to it;
- (B) establish and maintain, to the satisfaction of the Secretary, a secure area or place in which such returns or return information shall be stored;
- (C) restrict, to the satisfaction of the Secretary, access to the returns or return information only to persons whose duties or responsibilities require access and to whom disclosure may be made under the provisions of this title;
- (D) provide such other safeguards which the Secretary determines (and which he prescribes in regulations) to be necessary or appropriate to protect the confidentiality of the returns or return information;
- (E) furnish a report to the Secretary, at such time and containing such information as the Secretary may prescribe, which describes the procedures established and utilized by such agency, body, or commission or the General Accounting Office for ensuring the confidentiality of returns and return information required [hereunder].” [Section 6103(p)(4) of the I.R.C., as amended by the Tax Reform Act of 1976]

The 1976 law also requires that after using IRS data the recipient agency

must either return it to the IRS or render it completely undisclosable and so report to the Service.

The 1976 law requires the Secretary of the Treasury to file quarterly reports with the House Committees on Ways and Means, the Senate Committee on Finance, and the Joint Committee on Taxation describing

. . . the procedures and safeguards established and utilized by [recipient agencies] . . . for ensuring the confidentiality of returns and return information . . . [as well as] deficiencies in, and failure to establish or utilize, such procedures. [Section 6103 (p)(5) of the I.R.C., as amended by the Tax Reform Act of 1976]

The 1976 law also authorizes the Comptroller General to audit the implementation of safeguard requirements.

The Commission is satisfied that the confidentiality of IRS information disclosed to other Federal agencies is now well protected by the statutory safeguard requirements, IRS review authority, periodic reporting on safeguards to Congress, and the Comptroller General's audits.

PENALTIES FOR UNAUTHORIZED DISCLOSURE

The Commission recommended in 1976 that the ceiling on the fine for unauthorized disclosure of tax information specified in Section 7213 of the Internal Revenue Code be raised from \$1,000 to \$5,000, and that penalties be made applicable to former employees of Federal, State, and local governments as well as to present employees and to government agency contractors that have access to Federal tax information. The Commission refrained from recommending that the offense be treated as a felony, rather than a misdemeanor, but only because the change might present practical problems in obtaining convictions.

The Tax Reform Act of 1976 amended Section 7213 to raise the potential fine to \$5,000, to provide for possible imprisonment of up to five years, and to make unauthorized disclosure a felony. It applies its penalties specifically to offending present *and* former Federal and State employees who have or have had access to Federal tax information, to agents (including contractors) of Federal and State agencies, and to local child-support officials who receive tax information in connection with their enforcement activities. Offenders who are Federal employees may also be dismissed.

A new section of the Internal Revenue Code, added by the Tax Reform Act of 1976, provides additional deterrence to unauthorized disclosure by permitting taxpayers to bring civil actions to recover actual damages against officials who knowingly or negligently make such an unauthorized disclosure of tax data. [Section 7217 of the I.R.C.] Where willful or grossly negligent violations have occurred, it specifies that the taxpayer may be awarded punitive damages as well.

While the Commission did not recommend the enactment of statutory authorization for civil actions in its interim report, it recognizes that the availability of civil remedies for taxpayers is likely to deter departures from

the rules of confidentiality prescribed by the Tax Reform Act of 1976. Moreover, the Commission has considered as a general matter the desirability of civil remedies for Federal agency violations of the Privacy Act of 1974, and has recommended that citizens aggrieved by intentional or willful agency violations be able to pursue civil remedies to recover actual and general damages and attorneys' fees.⁶ The details of the Tax Reform Act creating civil remedies are not congruent with the Commission's general recommendations, however, in that they make individuals, rather than an agency, liable for wrongful disclosure. The Department of Justice has expressed concern about this aspect of the Tax Reform Act of 1976.

THIRD-PARTY SOURCE INFORMATION

THE PROBLEM

Much of the discussion, analysis, and debate regarding IRS disclosure of tax information to other government agencies has focused on the dissemination of an individual's tax return. In fact, these issues are often characterized collectively as "tax return confidentiality."

In undertaking its examination of IRS policies and practices regarding disclosure, the Commission has also focused primarily on the dissemination of tax returns and information from tax returns for uses other than Federal tax administration. In developing the recommendations, both in its interim report and in this chapter, the Commission has not questioned the basic violation of privacy resulting from the decision by Congress to require extensive disclosure of personal information by individual taxpayers to the IRS. Accepting the congressional determination that such compulsory disclosure is justified by the need to finance government operations, the Commission directed its attention to the propriety of using such data for purposes for which, and in circumstances where, the Congress has never established such extraordinary disclosure requirements.

In examining IRS disclosure policies, however, the Commission realized that a substantial portion of the information maintained and disclosed by the IRS has not been provided to it by the taxpayer. In addition to disclosing tax returns, the IRS discloses many types of individually identifiable information that it has acquired from third-party sources during the course of administering the tax laws. The Commission considered as a separate issue whether the standards of disclosure that apply to such third-party source information should differ materially from those recommended for tax returns.

The Commission recognizes that there are reasons for concluding that lesser standards of confidentiality should be applied to third-party source information; however, the Commission also recognized that there are reasons for applying more stringent safeguards. Accordingly, the Commission solicited the views of witnesses at its hearings and of other interested persons and organizations regarding the treatment of third-party source information. In addition, the Commission requested the IRS to undertake a

⁶ See Chapter 13 for a discussion of this issue.

special three-month monitoring of its disclosures to identify precisely what types of third-party source information are disclosed regularly by the Service to other government agencies for purposes unrelated to Federal tax administration.

THE CASE FOR BROADER DISCLOSURE

There is an obvious argument for the proposition that information obtained by the IRS about an individual from sources other than the individual himself should be more generally available to other government agencies than the tax return filed by the individual.

A primary concern that permeates the consideration of tax return confidentiality arises from principles and values that are reflected in the Fifth Amendment to the Constitution. When is it appropriate to compel an individual to disclose information that can be used to penalize him? The courts have held that the Fifth Amendment does not prevent prosecutions for violations of the filing requirements of the Internal Revenue Code.⁷ While the statutory establishment of appropriate disclosure standards is not limited by Constitutional protections, the fairness of using data disclosed as a result of legal compulsion for purposes unrelated to the purpose for which the information was compelled is an issue of overwhelming importance. When information about an individual has been accumulated by the IRS from sources other than himself, the question of self-incrimination simply does not arise. Accordingly, it can be argued that disclosure of such information need not be limited to the same extent as information acquired by the IRS from the individual under threat of criminal penalties.

This argument can be buttressed by the fact that much of the information acquired by the IRS from third-party sources is a product of the investment of time and other resources by employees of the Federal government. As a result, the conclusion that such data ought properly be characterized as a "generalized governmental asset"—a conclusion specifically rejected by the Commission in this chapter—can more easily be defended with respect to third-party source information than to tax returns, which are largely the product of the taxpayer's efforts and not those of the government.

THE CASE FOR STRICTER STANDARDS

While the absence of Fifth Amendment considerations and the recognition of the cost of collecting the data suggest that restrictions on disclosure of third-party source information need not be as severe as those applicable to tax returns, there are in fact compelling reasons for the imposition of more severe limits on the disclosure of third-party source data than on the disclosure of tax returns.

Although information disclosed to the IRS by a taxpayer is disclosed under compulsion of law and the threat of severe criminal and civil penalties, the taxpayer knows the substance of information that might be

⁷ *United States v. Sullivan*, 274 U.S. 259 (1927).

used against him and, some argue, he should realize that the information he gives to the IRS will be used for purposes well beyond Federal tax administration. During hearings before the Commission, for example, a representative of the Department of Justice asserted, in defending continued access to tax information by the Department of Justice, that taxpayers know full well that information contained on tax returns might be used by other government agencies for purposes unrelated to Federal tax administration.⁸

When information about a taxpayer is acquired from third-party sources, the taxpayer is very unlikely to know its substance and may not even be aware of its existence. In such circumstances, the opportunity for an individual to protect himself against the use by others than the IRS of erroneous, incomplete, or outdated information is effectively negated. Accordingly, the risk to individuals of arbitrary or unfair treatment at the hands of his government are significantly increased.

It is, moreover, apparent that the IRS has not been designated by the Congress as an agency responsible for routinely collecting information on behalf of other agencies. Just as the Congress has given the IRS extraordinary powers to compel the disclosure of information by an individual about himself, the Congress has established broad powers to enable the Service to gather information from other sources as well. The rationale for both forms of power is the same—effective government depends upon revenue collection. The overwhelming importance of that objective justifies the compulsion of information from a citizen about himself as well as the creation and use of broad investigative authority. The Commission believes, however, that the fact that the Congress has not given such broad investigative authority to other government agencies wishing to acquire tax information from the IRS is itself a clear manifestation of the inappropriateness of disclosure by the Internal Revenue Service. Such inappropriateness, compounded by the increased risks to the subject because he may be unaware that data about him has been collected or what the data collected includes, suggests that third-party source information collected by the Service should be used and disclosed solely for purposes of Federal tax administration.

The Internal Revenue Service Special Study

As noted above, the Commission requested the Commissioner of Internal Revenue to maintain a full accounting for one month of the disclosures that were actually made by Internal Revenue Service offices throughout the nation. Former Commissioner Alexander graciously consented to undertake the accounting, and ordered that detailed disclosure logs be maintained in the field for the month of April 1976. The Commissioner directed all Regional Commissioners, District Directors, and Service Center Directors to furnish a report of all disclosures made to Federal agencies. To assure accuracy, the Commissioner further ordered

⁸ Testimony of Deputy Attorney General, U. S. Department of Justice, *Federal Tax Return Confidentiality*, Hearings before the Privacy Protection Study Commission, March 11, 1976, pp. 70-71.

that negative reports should be filed if there are no disclosures during this period. In order to diminish the probability of generating results skewed by the peculiarities of a single month, the disclosure accounting order was subsequently extended through the end of June 1976 at the Commission's request.

The individual summaries of disclosures prepared in the field were provided by the IRS to the Commission staff. The staff prepared a summary of disclosures recorded for each of the three months, which appears in the appendix volume of this report on tax return confidentiality.

The summaries set forth the number and character of disclosures both of information provided by taxpayers and information provided by third parties. They clearly reflect an interdependence between data accumulated from third parties and data acquired directly from a taxpayer insofar as recipient agencies' needs are concerned. Much third-party information relates to particular tax returns, and in many instances, third-party information has been acquired because of a compulsory reporting requirement on the third party. A taxpayer's own return may, for example, reflect information about other individuals. Information returns, compelled by law, are specifically designed to provide substantial amounts of information about third parties. In other instances, the third-party information disclosures made during this three-month period reflect the value to other agencies of the IRS's special investigative authority. Intelligence files, reports of conversations, and the work product of revenue agents were disclosed on a regular basis.

There are clear indications in the disclosure accounting of the tendency of other agencies to view IRS files as sources of information that could have been easily obtained from other sources. In a number of instances, for example, the IRS disclosed to other agencies information that was clearly taken from generally available public records. Reliance upon the IRS as a source of "newspaper articles" and "auto registrations obtained from State department of motor vehicles" confirms the habitual reliance by other government agencies on the IRS as a rich source of data.

THE COMMISSION RECOMMENDATION

The results of its analysis of the IRS's disclosure accounting confirm the Commission's belief that disclosures of third-party source data cannot be regarded lightly. The Commission does not believe that the absence of Fifth Amendment considerations constitutes a compelling argument in favor of the untrammelled disclosure of third-party source information. Concerns about invasions of personal privacy are not synonymous with Fifth Amendment protections, nor does the Commission believe that statutory measures to protect personal privacy should be limited to the scope of the Constitution's protections.

The Commission has, therefore, concluded that the same standards of disclosure should be applied to third-party source and to taxpayer-supplied data maintained by the IRS. The Commission believes that there are compelling arguments justifying strict disclosure safeguards for both types

of information. Moreover, if the standards are not the same, an agency whose access to one type of information is restricted may well be able to circumvent the restriction by seeking the same information acquired by the IRS from a different source. Finally, the Commission is fully aware that the establishment of different disclosure restrictions for information obtained by the IRS from different sources may well impose significant administrative burdens on the IRS. In light of the foregoing considerations, the Commission recommends:

Recommendation (5):

That all of the information about taxpayers in the possession of the IRS, regardless of source, be subject to the same disclosure restrictions recommended by the Commission in this chapter and in its interim report.

DESIRABILITY OF FURTHER LEGISLATIVE CHANGE

The Commission believes that the Tax Reform Act of 1976 has effected a number of important and highly desirable changes in furtherance of the protection of taxpayers' rights. The Commission's overriding concern at present is that those agencies whose access to tax data for non-tax purposes was partially or wholly frustrated by the 1976 legislation will prevail upon the Congress to weaken its restrictions before the impact of the 1976 changes can be adequately assessed. The Department of Justice has already requested that the new limitations on disclosure be postponed because of its concern about ambiguous language in the statute and the possibility of a proliferation of civil suits by taxpayers aimed at delaying important non-tax criminal investigations.

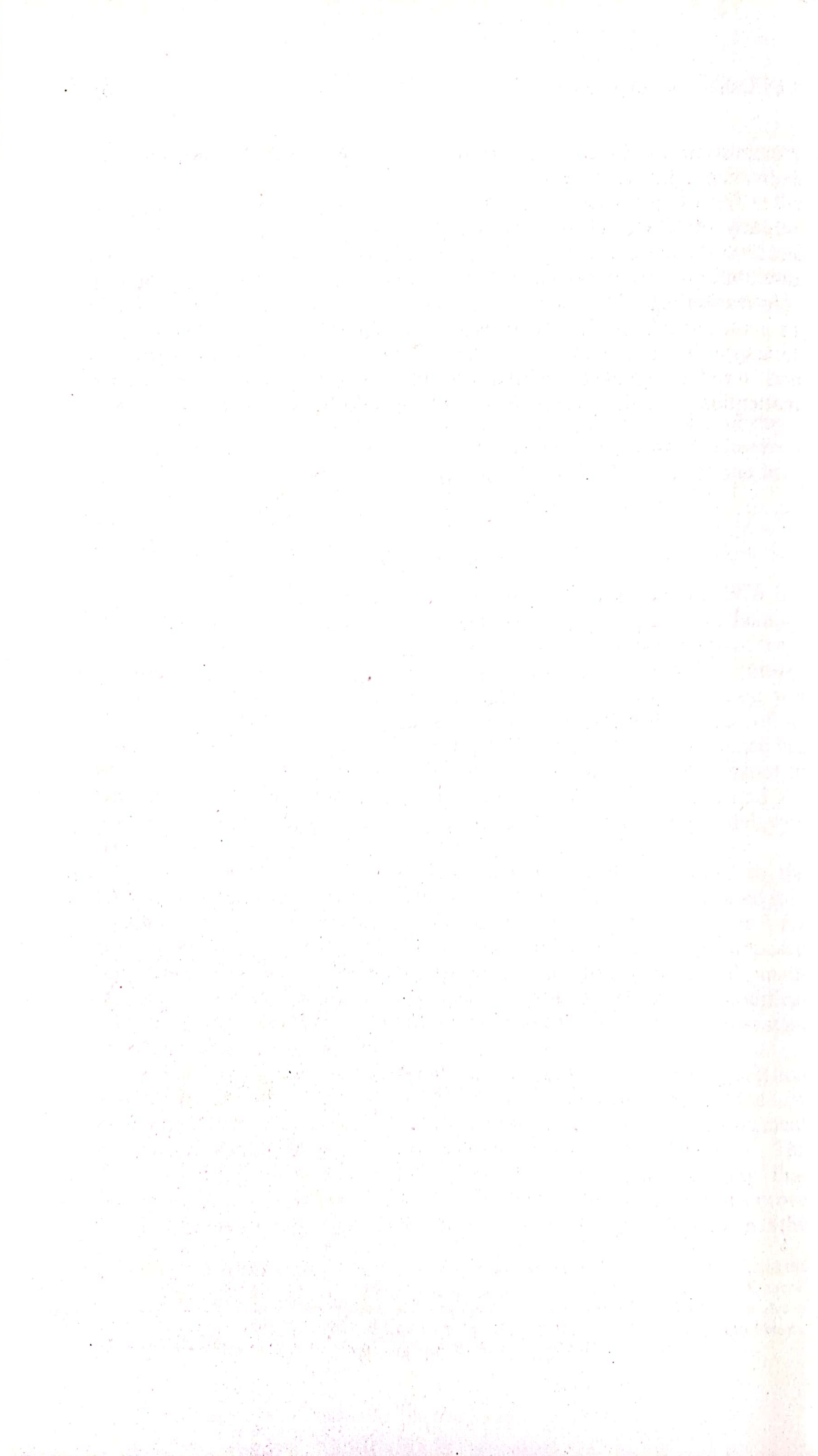
Attorney General Bell presented this argument in a letter to the Chairman of the House Committee on Ways and Means, and repeated it in testimony before the Oversight Subcommittee of that Committee.⁹ He recommended in particular that civil and criminal sanctions be imposed only where "willful" rather than "knowing" or "grossly negligent" unauthorized disclosures of tax information have been made. Such a modification, if adopted, would increase the standard of proof necessary to sustain an action for wrongful disclosure.

The Commission recognizes that the complexity of the 1976 legislation will require judicial interpretation. Moreover, it fully recognizes that the new disclosure limitations may to some extent impede non-tax law enforcement activities that depended in the past on easy access to tax information. The Commission made its recommendations with a full understanding that denial of access to tax information is likely in some instances to prove burdensome to the agency subject to the restrictions. This is a price that the

⁹ Letter from Attorney General Griffin Bell to Representative Al Ullman, Chairman of the House Committee on Ways and Means, February 11, 1977; and testimony of Attorney General Griffin Bell, *Administrative Summons and Anti-Disclosure Provisions of the Tax Reform Act of 1976*, Hearings before the Subcommittee on Oversight of the Committee on Ways and Means, U. S. House of Representatives, 95th Congress, 1st Session, pp. 4-47.

Commission would consciously accept in return for the protection of individual rights that will ensue.

The Commission believes that continuous public and congressional scrutiny of IRS disclosures is essential if taxpayers' rights and agencies' needs are to be constantly weighed and balanced. It therefore hopes that disclosure policy will be a matter of continuing concern and public debate. Information regarding the practices and consequences of disclosure should be made available on a regular basis both to the Congress and to the public to assure that the disclosures authorized by law continue to be warranted and to reduce the likelihood that unauthorized disclosures will result from inattention or actions taken in the interest of administrative convenience.



Chapter 15

The Relationship Between Citizen and Government: The Citizen As Participant in Research and Statistical Studies

The variety of research and statistical studies that require the collection of information in individually identifiable form is limited only by the interests and concerns of society for human wants and needs, and by the assumptions of researchers and statisticians as to the topics that merit exploration. This chapter reports on the Commission's examination of these activities and recommends action by the Congress and agencies of the Federal government to protect the interests of individuals who are the subjects of research and statistical records developed under Federal authority or with Federal funds.

The Commission's examination of the collection, maintenance, use, and dissemination of information and records about individuals for research or statistical purposes was premised on the following observations.

First, research and statistical activities generally do not lead to an immediate or direct benefit for the individual subject as such. The researcher asks for the individual's participation or for information about him, but society as a whole, rather than the individual, is the ultimate beneficiary.

Second, research and statistical activities depend heavily upon the voluntary cooperation of the individual in providing *accurate* and *reliable* information. On the theory that responses will be more candid and complete if individuals are convinced that the information they provide will not come back to haunt them, researchers who directly question subjects usually assure them confidentiality and, when the study design calls mainly for observation, the observer usually promises anonymity.

Third, assuring that information will not be disclosed to third parties in individually identifiable form is especially important in research on deviant behavior, such as drug and alcohol abuse, gambling, and prostitution; in studies of topics such as abortion and institutionalized discrimination; and in probes of public attitudes on controversial social issues, such as busing and welfare.

Fourth, both government agencies and research institutions outside government are undertaking more and more of the kinds of studies that require assurances of confidentiality or anonymity. The vast banks of

records on individuals built up by the Federal government in the course of performing its legitimate functions constitute a valuable data resource for research and statistical activities. Some of these records are currently released in anonymous form for general public use. Because careful removal of the elements of individual identification is a complex and expensive process, however, the rich lode of agency data has barely been tapped.

Fifth, different research and statistical projects use widely differing methods of collecting information about individuals. These differences affect the relationship between researcher and subject, which, in turn, affects the individual's ability to comprehend and control the way information about him is used. In a laboratory setting there is likely to be a close working relationship between researcher and subject. Surveys based on personal interviews similarly involve a direct, if somewhat more transient, relationship. Telephone interviewing, of course, weakens the relationship considerably, and mail surveys can be conducted without any personal contact. When information is extracted from program records or data archives, the individual subject is seldom even aware that information about him is being used.

After examining the standards and procedures for the protection of personal privacy in a number of research and statistical activities, the Commission reached three main conclusions:

- Research and statistical activities are becoming more dependent on information originally collected or maintained for administrative purposes, a dependence that attenuates the relationship between researcher and data subject and weakens the individual's ability to control the way information about him is collected and used.
- While an expectation of confidentiality is, and has been, an integral part of research and statistical activities, their growing number raises serious questions about the validity of that expectation.
- The use of individually identifiable research and statistical records for administrative, regulatory, or law enforcement purposes encourages abuse of the expectation that information will be kept confidential.

The Commission's principal objective is to strike a proper balance between the individual's interest in personal privacy and society's need for knowledge. In research and statistical activities, the threat to personal privacy comes mainly from information and records collected and maintained in individually identifiable form. Thus, the Commission believes that the first and fundamental step toward achieving the desired balance is to establish a clear boundary between the use of such information (regardless of source) that is collected, maintained, or disseminated for a research or statistical purpose, and the use of information that is collected, maintained, or disseminated for other purposes. Assuming that such a functional boundary can be established, the Commission proposes policy and rules for the transfer of individually identifiable information or records within and

across the boundary, and identifies the role it believes an individual should play in such transfers.

The Commission's public-policy objectives here are, as in other areas of its inquiry, to minimize intrusiveness, to maximize fairness, and to create a legitimate, enforceable expectation of confidentiality. The recommendations in this chapter aim mainly at achieving the third goal; that is, at strengthening and systematizing the confidential status of individually identifiable information used for research and statistical purposes. A clearly marked boundary between the use of information for such a purpose and its use for administrative or other purposes is an essential first step in eliminating the possibility that the information an individual contributes directly or indirectly to a research or statistical activity will be used to his detriment.

Nevertheless, minimizing intrusiveness and maximizing fairness are also of concern to the Commission here. The close dependence of research and statistical activities on public cooperation acts as a natural brake on intrusiveness in the nature of the questions asked of research subjects. The notice and consent requirements specified in *Recommendations (10), (11), and (12)*, below, would reduce intrusiveness by reinforcing the individual's right to refuse to participate in the data-collection process. They also promote fairness in collection practices by specifying the ground rules for use and disclosure of the data collected. *Recommendation (13)* promotes fairness by assuring the individual an opportunity to see and copy any record about himself that is disclosed unless the record keeper can guarantee that the record itself, or the individually identifiable information it contains, will not be used to his detriment.

The Commission's study focused on federally controlled or assisted research and statistical activities and thus its recommendations are confined to research and statistical activities in that category. This limitation should not be interpreted as a judgment by the Commission that the protection of individually identifiable data is of concern only when there is some Federal involvement. Rather, it recognizes that most of the country's organized research and statistical activities are at least partially dependent on Federal funding, and that where there is Federal involvement, some means of protecting record confidentiality already exist and are being used to at least some degree.¹

The Commission considers its general principles valid as guidelines for research and statistical activities beyond the reach of Federal involvement. The Commission does not have enough evidence to judge whether these guidelines will need modification to make them generally applicable, or to suggest policy mechanisms for implementing them where research and statistical activities are independent of the Federal government. The Commission does believe, however, that the recommendations in this

¹ For example, the Federal Reports Act [44 U.S.C. 3501-3511] provides central structure for the disclosure of Federal agency records. Disclosure is also regulated by the Privacy Act [5 U.S.C. 552a], the Freedom of Information Act [5 U.S.C. 552], and by specific confidentiality statutes regarding alcohol and drug abuse treatment records [42 U.S.C. 582 and 21 U.S.C. 1175].

chapter can serve as a paradigm for the guidance of all research and statistical activities.

RESEARCH AND STATISTICAL ACTIVITIES

The term *research* will be used in this chapter to refer to any systematic, objective process designed to obtain new knowledge, regardless of whether it is "pure" (aimed at deriving general principles) or "applied" (aimed at solving a specific problem or at determining policy). *Statistics* refers both to the data obtained through enumeration and measurement and to the use of mathematical methods for dealing with data so obtained. *Statistical methods* can be *descriptive*, that is, any treatment designed to summarize or describe important features of data, or *inferential*, that is, techniques for arriving at generalizations that go beyond the sample being analyzed.

The research and statistical activities that use individually identifiable information draw huge quantities of it from Federal administrative records, both for routine production of statistical reports and for the performance of statistical analysis or other research tasks. Researchers draw other information directly from individuals as part of the research process. As to Federal agencies, some conduct the bulk of their research themselves. For example, the Bureau of the Census not only conducts all its own surveys but also performs data-collection services for other agencies on a reimbursable basis. A great deal of Federal agency research, however, is contracted out to private and semi-public research organizations and Federal grants support numerous research projects at other levels of government and in the private sector.

A typical research project starts with a hypothesis and proceeds through four stages: data collection; data processing; data analysis and interpretation; and finally, publication or dissemination of findings. Before data collection can begin, assumptions must be made about what information is relevant to the hypothesis and what kind of individuals are appropriate data subjects or respondents. Processing may involve anything from simple arranging and manual tabulations to complex coding and sophisticated computer analysis. Data storage and retrieval may rely on anything from handwritten notes and human memory to punched cards, magnetic tapes and discs, films, and computer memory. Data can be analyzed and interpreted in terms of the original hypothesis, or—when the research design less closely approximates the canons of the scientific method—in the light of less clearly articulated assumptions. Statistical manipulation may or may not be required. For some studies, a simple tabulation or descriptive case study may be the result. The final step is a research report to make the findings available to others.

In most studies, the researcher or statistician is interested in the individual primarily as a carrier of attributes or characteristics of groups or distributions. Individual data are often used as major building blocks during the analytical process, but in the final stage both research findings and statistical data are characteristically presented in aggregate form. In

research, the purpose is to discover and analyze relationships among variables; in statistics, the purpose is to define average characteristics or discover their distribution or both. Individual data are therefore grouped according to characteristics and reported in the aggregate.

To illustrate, suppose the Department of Labor, for its own policy-making purposes, sponsors a study comparing and contrasting two manpower training programs. The project design requires extensive questioning and observation of two groups of trainees over a two-year period during which at least three series of interviews are conducted. Despite the research team's close, long-term involvement with the research participants, no information supplied by the respondents is released until the final report and then the information is in statistical summary form. If the final report contains quotations from respondents for illustrative purposes, they are presented anonymously, not as individual data with identifiers attached. The bulk of the data are presented in tables according to categories, such as training program A or B, sex, extent of formal education previously received, training, occupation, attitudes toward training programs, and whether participation was mandatory or voluntary.

In most cases, omitting identifiers, such as name, address, telephone number, or subject identification number, is enough to protect the participants' anonymity. In certain cases, however, other information can identify the respondents, as when the study is about people in a relatively unusual occupation such as network TV anchorwomen, or is limited to people in a specific geographic area or income bracket. In such cases, characteristics such as occupation, age, or income may have to be suppressed to preserve the participants' anonymity.

It is often difficult to decide in advance which information beyond the standard items of name, address, or telephone number will or will not constitute identifying information. It must be emphasized, however, that research and statistical activities are undertaken not in the investigative sense of discovering what there is to know about identified individuals, but in pursuit of systematic knowledge about human beings in groups. A distinction should also be drawn between the *use* of information for research and statistical purposes and the *methods* employed for information gathering and analysis. The methods researchers and statisticians use in data collection and analysis may also be useful for purposes wholly unrelated to research and statistics, notably for law enforcement, evaluating compliance with program requirements, assessing performance, and even for commercial exploitation. Thus, the duties and safeguards recommended in this chapter do not apply to all information about individuals collected or used according to what may be considered research or statistical methods.

Definitions

In the discussion of the Commission's recommendations, the following definitions apply:

Individual:

any citizen or permanent resident of the United States.

Individually Identifiable Form:

any material that could reasonably be uniquely associated with the identity of the individual to whom it pertains.

Research and Statistical Information:

any information about an individual, obtained from any source, used for a research or statistical purpose.

Research and Statistical Record:

any item, collection or grouping of information maintained in any form of record *solely* for a research or statistical purpose.

Research and Statistical Purposes:

the developing and reporting of aggregate or anonymous information not intended to be used, in whole or in part, for making a decision about an individual that is not an integral part of the particular research project.

Functional Separation:

separating the use of information about an individual for a research or statistical purpose from its use in arriving at an administrative or other decision about that individual.

THE PRINCIPLE OF FUNCTIONAL SEPARATION

Federal agency research and statistical activities tend to be reasonably well defined and performed by organizational components functionally separated from policy and decision-making units. This is also generally characteristic of research conducted by academic institutions and by organizations specializing in research, but less likely to be true of research and statistical activities conducted by State or local governments. Even where organizational separation exists, however, individually identifiable information and records used for research or statistical purposes can be commingled with information and records used for administrative purposes. This can occur by design, as well as by chance, as when a continuing study of a program serves not only as a source of statistical summaries but also as an element in determining the eligibility of particular individuals for benefits under the program. Furthermore, in some social experiments the same individual may be both a beneficiary under the program and a research subject. Thus the flow of information from researchers to program personnel who make decisions about the individual may be loosely restricted or not restricted at all.

Existing law does not clearly discourage such commingling. Neither does it clearly restrict the exchange of information between research or statistical components and administrative units of an organization, nor necessarily preclude access to individually identifiable data maintained by researchers for investigative, legislative, or judicial purposes. The Federal Reports Act [44 U.S.C. 3501-3511], which prescribes the central structure for Federal agencies' data management practices, was in fact framed to facilitate data sharing among agencies in order to reduce the reporting burden on business by eliminating redundant data collection. It does not, however, license unrestricted flows of information among agencies and there

are laws that extend confidentiality protection to data collected or maintained by certain agencies, or to some particular types of information under the control of any agency.

The Commission believes that existing law and practice do not adequately protect the interests of the individual data subject. It perceives two main deficiencies. First, the individual needs more protection from inadvertent exposure to an administrative action as a consequence of supplying information for a research or statistical purpose. The individual is entitled to protection when he supplies information indirectly by way of applying for benefits under an agency program that uses client information for research or statistical purposes, just as when he volunteers information directly to a researcher. Second, public confidence in the integrity of research and statistical activities and in the collection and use of the data on which they depend needs strengthening. Research and statistical results are too important to the common welfare to risk eroding public trust in the activities and processes that produce them.

The Commission believes both needs will be met if the data collected and maintained for research or statistical use cannot be used or disclosed in individually identifiable form for any other purpose. To erect such a barrier, however, there must be a clear functional separation between research and statistical uses and all other uses. The separation cannot be absolute in practice but the principle must be established that individually identifiable information collected or compiled for research or statistical purposes may enter into administrative and policy decision making only in aggregate or anonymous form. The reverse flow of individually identifiable information from records maintained by administrators and decision makers to researchers or statisticians can be permitted, but only on the basis of demonstrated need and under stringent safeguards.

There are two classes of exceptions to the principle of functional separation. One is when the data subjects directly receive the benefits of the research findings, as in experimental medical treatment or testing, or experimental housing or education projects. The other is when societal imperatives outweigh the individual's claim to protection.

The Commission recognizes that it is not always easy to decide whether a particular investigative purpose can properly be considered research or statistical. Program evaluation, for instance, is considered evaluation research in some cases, but in others it is considered a standard operational component of an agency's mission. For functional separation to protect the individual's interest, the criteria for determining what is a research or statistical activity must be consistently applied.

The threshold policy question is the extent to which innovative administrative and program management practices, including quality control, are to be considered research and statistical activities. The answer lies in what functional separation is meant to achieve. The aim of functional separation is to prevent individually identifiable research or statistical information from affecting or modifying decisions about the individual to whom the information pertains. Consequently, if a given activity can gain nothing from identifying particular individuals—if, for example, its interest

is only in uncovering underlying principles of good management practice—the investigation can safely be considered research, and respondents informed accordingly. If, however, the reverse is true, the investigation cannot be considered a research or statistical activity and the respondents cannot be promised confidentiality.

The Commission sees the need for a specific set of standards and guidelines for organizational information practices to limit the exposure to risk of the individual who contributes information, either directly or indirectly, to a research or statistical activity. The standards and guidelines should also strengthen the ability of the individual to protect himself. The Commission believes that standards and guidelines can do this without discouraging the rigorous research and statistical activities that society needs, provided that clear functional separation is accepted as a basic principle. Accordingly, the Commission recommends:

Recommendation (1):

That the Congress provide by statute that no record or information contained therein collected or maintained for a research or statistical purpose under Federal authority or with Federal funds may be used in individually identifiable form to make any decision or take any action directly affecting the individual to whom the record pertains, except within the context of the research plan or protocol, or with the specific authorization of such individual.

ASSURING COMPLIANCE WITH THE SEPARATION PRINCIPLE

Establishing the principle of functional separation within a Federal agency requires three preliminary steps:

- deciding what uses and disclosures of the individually identifiable information an agency collects or maintains for a research or statistical purpose are proper;
- establishing procedures for protecting the confidentiality of the individually identifiable data an agency gathers or maintains; and
- setting forth the conditions under which information an agency maintains may be used or disclosed in individually identifiable form for a research or statistical purpose.

Because these three steps are interrelated, the measures recommended for implementing each of them are prescribed below in order of dependence. Thus, acceptance of each recommendation assumes acceptance of those that precede it.

DECIDING WHAT USES AND DISCLOSURES ARE PROPER

There would be little chance that the principle of functional separation would be violated if research and statistical findings could not enter into decision-making processes in individually identifiable form. Strictly applied,

functional separation would eliminate the disclosure of individually identifiable research and statistical data for any purpose other than a research or statistical one.

Most researchers regard the pledge of confidentiality as the *sine qua non* of voluntary participation in research for the reasons noted earlier. Recognition of its necessity underlies the statutory protections for the confidentiality of data collected by the Bureau of the Census [13 U.S.C. 8,9] and the National Center for Health Statistics [42 U.S.C. 242m], as well as the confidentiality protection that special legislation provides to particular research projects using alcohol and drug addiction treatment records. [42 U.S.C. 4582; 21 U.S.C. 1175]

Nor is it only protection of information collected directly from individuals for a research or statistical purpose that demands consideration. The confidentiality of research data obtained from other sources, including administrative records, without the immediate knowledge of the research subject is equally significant to both the researcher and the policy maker. Public attitudes are volatile, and the public's willingness to participate, or ultimately to consent to researcher access to administrative records, is dependent on trust in the integrity of the process.

Conversely, there is the public's right to hold public agencies accountable for efficiency and economy in the discharge of their duties. Assuring compliance with laws and regulations in the conduct of government programs, carrying out criminal law enforcement and investigative functions, and assuring fairness in civil and criminal court proceedings can all create demands for access to individually identifiable research and statistical records that are difficult to deny as a matter of public policy. So far such value confrontations have not been common but there are signs that they will grow in number and thus must be taken into account. Because other justifiable goals may impinge on the individual's privacy interest and on the integrity of the relationship between researcher and data subject, the Commission believes that it would be unrealistic to deny *all* claims for disclosure of *all types of research and statistical records* under *all circumstances*. At present, the mechanisms agencies use to resolve confrontations over disclosure are largely *ad hoc* and tend to vary considerably depending on the source of the request and the class of information sought. Judicial demands for individually identifiable research or statistical information, for instance, may be resolved on Constitutional or common law grounds, or by invoking State or Federal protective statutes. In some instances, the newsman's privilege, established by State statute, has been invoked to apply to research information.

Section (3)(b)(1) of the Privacy Act of 1974 allows one component of a Federal agency to ask another component of the same agency for access to research or statistical records for use in administrative decision making. These requests, which the Privacy Act treats as internal need-to-know disclosures, are dealt with administratively, and the result may be governed

or influenced by the existence or absence of independent statutory directives. For example, in the Commission's hearings on medical records,² the Director of the National Center for Health Statistics (NCHS) described the kind of dilemma that can arise. Another component of the Department of Health, Education, and Welfare (DHEW), NCHS' parent agency, had requested individually identifiable data collected by the Center on family planning procedures for the purpose of checking whether the consent procedures for sterilization, as reported to NCHS, were adequate. NCHS declined to release the information, citing the confidentiality provisions in its own enabling statute. The Secretary of DHEW did not compel NCHS to make the data available to the other DHEW component although he had discretionary authority to do so under the NCHS statute. He might well have done so if the legislative history of the NCHS statute had not made clear that such information should be disclosed without individual consent only for research and statistical purposes.

There are now two basic mechanisms for limiting the use and disclosure of records maintained for research and statistical purposes. One is to protect the confidentiality of such records by statute, a method that can specify the criteria for disclosure with some precision. The other is for the agency maintaining such records to exercise its discretion in responding to requests for disclosure as they arise.

Sole reliance on agency discretion has serious shortcomings. An official with responsibilities for both research and administrative activities is not always the best fulcrum on which to balance competing claims, as the NCHS dilemma suggests. It may be particularly difficult for an administrative official to be entirely objective in weighing the pros and cons of a disclosure when the request is in support of a program within his own agency, and the disclosure is requested by agency personnel on a need-to-know basis. Relying on agency discretion alone may well dilute any pledge of confidentiality for both researcher and data subject.

Objective criteria and orderly determination of the propriety of voluntary disclosures are better safeguards for the integrity of the research process than *ad hoc* ones, and are easier to define and adhere to uniformly when they are established by statute rather than by administrative action. It is particularly important that the prospective data subject know of, and know that he can rely on, the limitations on use and disclosure as a basis for consenting to participate in any research project. It is equally important that users have no doubt about what uses are permitted and what disclosures they may make.

STATUTORY EXCEPTIONS

Two types of statutory exceptions to the principle of functional separation deserve special consideration: (1) disclosures in response to compulsory process; and (2) disclosures for auditing purposes.

The Commission recognizes that several statutes presently protect

² Testimony of the National Center for Health Statistics, *Medical Records*, Hearings before the Privacy Protection Study Commission, pp. 54-56.

some specific types of data and all the records of some specific agencies, such as the Bureau of the Census, against compulsory process. No Federal statute, however, protects the confidentiality of individually identifiable research data in general. Consequently, they are subject to no uniform standard of protection.

As explained above, the Commission believes that when an individual is asked to reveal information about himself in confidence—less for his own than for society's benefit—the disadvantages of making the information available for purposes other than those stated to the individual usually outweigh the advantages accruing to other users. This is particularly true when the information is available through compulsory process because the disadvantages of this type of disclosure to researcher and subject far outweigh the advantage to any law enforcement investigation. If research and statistical data remain subject to compulsory process, regulatory agencies can seek access to research data for law enforcement and compliance control purposes, thereby immeasurably increasing the risk to the individual of participating in research. Furthermore, it is confusing for the research subject if some of the information he may provide is protected by law from compulsory disclosure but other information is not. For these reasons, the Commission believes the present legal protections are unacceptably ambiguous and far too limited.

There are at least three ways to give individually identifiable research information better protection from compulsory process: (1) by constitutional interpretation; (2) by statute; and (3) by administrative action. The DHEW regulations regarding research involving human subjects [45 C.F.R. 46] and the grant and contract instruments of several Federal sponsors of research illustrate the administrative approach. Better and wider use could certainly be made of this approach, but it is limited in that administrative regulation only governs the conduct of persons bound in one way or another to the agency issuing the rules. Furthermore, administrative regulations by themselves do not take precedence over legislative or judicial demands for information, and the courts are unlikely to recognize an administrative agency's plea that they do so.

A constitutional approach also has practical limitations. The experience of newsmen who have claimed the privilege of confidentiality as a First Amendment right does not encourage the hope that an analogous researcher's privilege would find judicial support. Although in civil litigation, where countervailing Fifth Amendment or other powerful rights are not asserted, the courts may be willing to recognize a privileged status for the researcher,³ in criminal prosecutions where a researcher privilege might infringe upon the Sixth Amendment right to cross-examine, courts are not likely to heed assertions of Constitutional privilege based on nothing stronger than a generalized concern for the integrity of the research process.

Statutory protections from compulsory process can be provided either

³ See *Richards of Rockford, Inc. v. Pacific Gas & Electric Company* 71 F.R.D. 388 (N.D. Cal. 1976); also, *Branzburg v. Hayes* 408 U.S. 665 (1972) where the Supreme Court held that a Grand Jury, given its unique powers of inquiry and pledge of secrecy could compel a reporter to disclose information that was "relevant and material to a good-faith grand jury investigation."

by general legislation to be interpreted by the courts with or without criteria; or by authority to grant immunity from compulsory process according to specified criteria that is delegated by statute to one or more administrative entities. Each method has its strengths and weaknesses. The former may be simpler but it is less predictable, because it would require the courts to adjudicate on a case-by-case basis. The latter, also subject to judicial review, can provide greater uniformity, but in turn has the disadvantage of interposing an additional level of administrative review.

Current Federal law, as noted above, provides examples of several types of protections of research data from compelled disclosure. The statute regarding disclosure of Bureau of the Census records [13 U.S.C. 8, 9] prohibits the use of individual census records for any purpose other than the statistical purposes for which they are created, and further prohibits anyone other than Bureau personnel from examining them. The National Center for Health Statistics has limited statutory protection [42 U.S.C. 242m] for all the individually identifiable research information it collects. Use for any purpose other than that for which the information was collected is prohibited except as authorized by DHEW regulations, and no publication or disclosure of information in individually identifiable form is permitted except with the consent of the individual to whom it pertains.

Patient records maintained in connection with any drug or alcohol abuse program or research activity conducted, regulated, or directly or indirectly assisted by a Federal agency or department, may only be disclosed for specified purposes, namely, to qualified personnel for specific research or audit provided that patient identities are not disclosed in any resulting reports, or pursuant to a court order issued for good cause. [42 U.S.C. 4582; 21 U.S.C. 1175]

The Secretary of DHEW may also authorize researchers engaged in mental health or alcohol or drug abuse research to withhold names or identifying characteristics of data subjects, and this immunity covers them in any Federal, State or local civil, criminal, administrative, legislative, or other proceeding. [42 U.S.C. 4582] The Law Enforcement Assistance Administration (LEAA) has both statutory immunity from compulsory process and a statutory prohibition against voluntary disclosure. [42 U.S.C. 3371] The LEAA statute prohibits any Federal employee or recipient of assistance under it to use or reveal individually identifiable research or statistical information for any purpose other than the one for which the information was obtained. In addition, copies of any individually identifiable information furnished under the statute are immune from legal process, and cannot be admitted as evidence without the individual data subject's consent, or used for any purpose in any action, suit, or other judicial or administrative proceeding.

Such statutory protections demonstrate that there are mechanisms that can effectively protect the subjects of research or statistical data from the hazards of compulsory disclosure and at the same time hold researchers accountable for unauthorized use or voluntary disclosure. Immunity can be provided for the researcher, protecting him from being compelled to disclose information; or to the research relationship, creating privilege for the

researcher-subject communication; or to protecting the interests of the data subject. Since researcher immunity would interfere with researcher accountability, the Commission considers it unacceptable. Similarly, a researcher testimonial privilege is deficient in that it expresses paramount concern for the research process, rather than for the individual data subject. It is the Commission's position that the relationship between the *individual* and the record-keeping *organization* is the one that needs to be controlled. The Commission, therefore, strongly favors statutory immunity which protects the rights and interests of the individual and also includes researcher accountability for voluntary disclosure.

The Commission has concluded that the individual's privacy interests as well as his right to refuse to testify against himself demand, albeit indirectly, that research and statistical records be generally immune to disclosure compelled by judicial order. Total immunity, however, is too broad. In part to protect research subjects, and in part to protect society's interest in assuring proper conduct by the researcher, access to research records ought to be permitted (though carefully controlled) when a researcher or research institution is under investigation for possible violation of law and confidential records constitute the only available source of information necessary for the investigation. If a research activity is suspected of having unnecessarily endangered research subjects, as in the infamous Central Intelligence Agency research on LSD, for example, or if a researcher is suspected of fraud, access to confidential research records may well be the only way to establish guilt or innocence.

There are also arguments for a statutory exception to the non-disclosure rule if disclosure is essential for auditing or evaluating Federal and federally funded research and statistical activities. Management and fiscal accountability are, after all, as fundamental to the integrity of the research process as is assuring the confidentiality of information. Nevertheless, the Commission believes that such access should be permitted only if the Congress has made a public-policy determination that audit or evaluation is necessary in the public interest; that is, if audit or evaluation has been authorized by statute. Even then, however, the Commission recommends stringent restrictions on disclosure.

There must also be an exception for transferring research and statistical information in individually identifiable form to archival storage. There are differences of opinion between the Bureau of the Census and the National Archives and Records Service as to how many years should elapse before census records are transferred to the Archives where they would become available to researchers. The Commission regards this as a matter of public policy that the Congress can resolve by redefining the statutory disclosure authority of both agencies.

There is also the researcher's moral and legal obligation to report acts of interpersonal violence he either witnesses or can reasonably anticipate. The Commission also believes that serious threats to the health and safety of an individual may, in some cases, justify violation of record confidentiality. Finally, the Commission believes that one of the surest ways to protect the interests of the individual is to give him a legal remedy when his rights have

been violated. The Commission therefore considers it essential for the individual to have the legal capacity to challenge researcher users or record keepers he believes are violating his interest in, or are demanding unwarranted access to, information about him, or to obtain redress after his rights have been violated. Consequently, *for areas in which such minimum protections do not now exist*, the Commission recommends:

Recommendation (2):

That the Congress provide by statute that any record or information contained therein collected or maintained for a research or statistical purpose under Federal authority or with Federal funds may be used or disclosed in individually identifiable form without the authorization of the individual to whom such record or information pertains only for a research or statistical purpose, except:

- (a) where the researcher reasonably believes that the information will forestall continuing or imminent physical injury to an individual, provided that the information disclosed is limited to that information necessary to secure the protection of the individual who may be injured;**
- (b) where information is furnished in compliance with a judicial order, including a search warrant or lawfully issued subpoena, and the purpose of the judicial order is to assist inquiry into an alleged violation of law by a researcher or an institution or agency maintaining research and statistical records, provided that:**
 - (i) any information so disclosed shall not be used as evidence in any administrative, legislative, or judicial proceeding against anyone other than the researcher or research entity,**
 - (ii) any information so disclosed shall not be used as evidence (or otherwise made public) in such a manner that the subject of the research may be identified, unless identification of an individual research subject is necessary to prove the violation of law, and**
 - (iii) an individual identified in any information to be made public in identifiable form be given notice prior to such publication and be granted standing to contest the necessity of such publication;**
- (c) where information is disclosed in individually identifiable form for the purpose of auditing or evaluating a Federal research program and such an audit or evaluation is expressly authorized by Federal statute; or**
- (d) where information is disclosed to the National Archives and Records Service pursuant to the Federal Records Act.**

And further, that should information be disclosed under any other conditions, an individual research subject identified in the informa-

tion disclosed shall have a legal right of action against the person, institution, or agency disclosing the information, the person, institution or agency seeking disclosure and, in the case of a court order, the person who applied for such an order.

CONDITIONS FOR STATUTORILY AUTHORIZED AUDITS

The legitimacy of access to individually identifiable research or statistical information for auditing purposes recognized in *Recommendation (2)* leaves some important issues to be resolved. The project manager who monitors an agency research project may have to examine individual data as an integral part of his responsibility, and the agency itself has an internal management obligation to audit. Also, the General Accounting Office (GAO) conducts external audits under its statutory authority to hold agencies and their research contractors accountable. While an audit is primarily financial, the audit team may occasionally need access to raw data about individual data subjects.

It is good information practice to incorporate safeguards for individually identifiable data as early as possible in the collection and processing stages of a research project, since every subsequent stage of research further exposes the data and increases the potential for breaches of confidentiality. The same reasoning applies to the auditing process. There are various ways for the auditing process itself to incorporate safeguards without losing efficiency.

First, the necessity for access to individually identifiable data can be minimized by inserting review mechanisms into the project plan and creating an audit trail. Second, if audit requirements cannot reasonably be met without access to individually identifiable data, the audit team can adopt procedures such as on-site inspection of the data or stripping the data of identifiers before they are removed from the research site. Such matters should be negotiated with the audit team to assure that the record subjects' interests are represented.

When auditors take individually identifiable data away from the research site, other safeguards will be needed. Inadvertent disclosure is obviously a concern in such instances. In addition, auditors may be less responsive to the assurances of confidentiality given when the data were collected than the researcher who collected them. This would be especially true for data open to compulsory process. The researcher would tend to resist access demands for law enforcement or other judicial and legislative purposes on principle, but the auditor might not. Unless the auditor is prohibited by law from disclosing individually identifiable data, some prior agreement between auditor and researcher covering compulsory demands would appear to be necessary. This is the reason the Commission recommends statutory restrictions on the disclosure of individually identifiable data.

Aside from the possibility of inadvertent or compulsory disclosure to third parties, there is the possibility that the auditor will use the information as the basis for a reinterview of the data subject. The issue is particularly

sensitive from the research standpoint. If recontact occurs before the research study is completed, the experience may modify the research environment and bias the results. For longitudinal studies, recontact by the auditor may make it more difficult for the researcher to obtain the further cooperation of data subjects, biasing the results in ways difficult to compensate for statistically. If information provided for research purposes may be used by auditors for individual review and perhaps recontact, the data subject should be notified of the possibility in his initial interview with the researcher.

In addressing these issues, it is helpful to keep in mind the distinction made earlier between studies that do not benefit data subjects and those that do. Studies connected with experimental social programs are an example of the latter. In the usual survey situation, respondents cooperate from a simple desire to contribute to the general fund of knowledge or perhaps out of a sense of social duty. There is nothing in such transactions to suggest that the information solicited will go farther than the stated use; indeed, usually the data subject gets assurances, not necessarily legally binding, that the information will be reported anonymously and used only for research purposes. If this is the case, an agency would be hard put to defend any use of the information as a basis for any action—particularly adverse action—with respect to an individual respondent. On the other hand, a person who receives benefits from participating in a pilot or other experimental program has, it can be argued, entered into an implied contract with the agency and assumed the responsibilities concurrent with the benefits. The information so collected can be considered to have administrative as well as research implications.

In dealing with Federal programs of the latter sort, the General Accounting Office has taken the position that its fiscal obligations to Congress require it to audit all aspects of experimental programs. According to the GAO, proper performance of its duties may oblige it to recontact data subjects and, in some circumstances, to reinterview participants as a check on the information collected by the original interviewer. The GAO has a substantial statutory base for its claim to this authority, and the scope of the examination-of-records clause which is mandatory in Federal procurement contracts has been construed broadly for auditors. On the other hand, an audit may uncover fraud or some other actionable breach of conduct on the part of the interviewer or program official. If that happens, and if there are no restrictions on the auditor's access to or use of individually identifiable data, completely innocent data subjects can be drawn into the investigation and have individually identifiable information about them made part of the record. Such disclosure can harm both the data subject and the research process without any corresponding benefit to the audit process or the investigation. Clearly, the data subject in these circumstances deserves complete insulation from disclosures of information about him. Safeguards should be required to minimize any untoward consequences arising from his unfortunate connection with someone else's wrongdoing.

The audit may also uncover some reportable condition or unlawful behavior on the part of the data subject himself. Unless the researcher is

legally obliged to report such a condition or offense, the auditor ought not to be permitted to do so. Information about the data subject should not be disclosable for law enforcement or other compliance purposes, nor should audit results be used for such purposes. Auditors who so disclose individually identifiable information should be subject to legal sanctions.

If compliance or law enforcement actions may result from the auditing of an experimental program, anyone asked to participate in the program should be so advised in advance. No data subject should be persuaded to participate in or provide information for a research project under assurances of confidentiality only to discover later that the data he has supplied have been used in ways he was not told in advance to expect.

In sum, the position of the Commission is that auditors should have as little access as possible to individually identifiable information obtained for research purposes, and that when audit access is necessary, there should be safeguards to protect individually identifiable data from inadvertent disclosure. In addition, an auditor should recontact research subjects only as a last resort. Research plans should be designed to include adequate monitoring and audit trails so as to minimize the need for recontact, and alternative methods of validation should be developed. To minimize harm to the individual or to the research results, any recontact should be negotiated, in advance, with the researcher.

Moreover, individually identifiable information obtained by the auditor should not be open to administrative use or compulsory process. Disclosure of individually identifiable data by the auditor should be governed by the restrictions applicable to the researcher. There should be sanctions for unauthorized use or disclosure of the information. The data subject should also be protected from disclosure of individually identifiable information about him when an audit involves the researcher in a civil suit or criminal proceeding. Finally, the prospective data subject should be adequately informed, in advance of participation, of the possibility of recontact for audit, if any, and of any compliance or law enforcement use of the information which could reasonably be expected to result from an audit.

The Commission, therefore, recommends:

Recommendation (3):

That when a Federal statute expressly authorizes disclosure in individually identifiable form of a research or statistical record for the purpose of auditing or evaluating a Federal or federally funded program, such statute should prohibit the use or disclosure of such information to make any decision or take any action affecting the individual to whom it pertains, except as authorized by that individual, or as the Congress specifically permits by statute.

PROCEDURES TO PROTECT CONFIDENTIALITY

Given the basic principle of functional separation and the recommended standards of confidentiality, there remains the question of

responsibility and procedures for maintaining those standards. The basic arguments for functional separation apply here as well: the public's trust in the confidentiality of research and statistical records needs strengthening, as do the legal safeguards protecting them.

Guidelines for analyzing the risk and establishing appropriate safeguards for individually identifiable information are essentially the same whether the information is used for research or for administrative purposes. Confidentiality safeguards for research and statistical data do not differ appreciably from those for other information about individuals, except that additional safeguards are needed in organizations which do more than conduct research and statistical activities. In those organizations, intramural transfers of information need monitoring in order to maintain functional separation and to prevent internal administrative or management uses of new information about individuals generated by a research or statistical activity.

The Commission believes that the single most important procedure for maintaining the confidentiality of research and statistical data is the prompt removal and destruction of identifiers. This procedure is already practiced in many research organizations. Ideally, identifiers should be removed or destroyed as soon as the data are collected and verified.

The Commission recognizes that identifiers must be retained in some kinds of research, most notably longitudinal and panel-survey studies which refer to the same respondents from time to time, but retention should be the exception, not the rule. The decision to retain identifiers should not be left solely to the discretion of researchers; it should be a matter of public policy, or a decision of agency administrators. Furthermore, the retention of identifiers should trigger special precautions, such as maintaining face-sheet information separate from the survey instrument, or recording personal identifiers in a separate file that is cross referenced to the rest of the data.

Accordingly, the Commission recommends:

Recommendation (4):

That any Federal agency that collects or maintains any record or information contained therein in individually identifiable form for a research or statistical purpose should be permitted to maintain such records or information in individually identifiable form only so long as it is necessary to fulfill the research or statistical purpose for which the record or information was collected, unless retention of the ability to identify the individual to whom the record or information pertains is required by Federal statute or agency regulation.

The Commission believes that the legal requirements for confidentiality should extend to all the research and statistical activities conducted under Federal sponsorship, the only question being whether Federal agencies should require them as a condition of funding. Federal agencies contract out much of their research and statistical work, and through grants support much private and academic research on human subjects. The relationship of contractors and grantees to their funding agency varies widely, especially in

the degree of Federal control. In theory, the contractor works to the agency's specifications and is required to deliver a defined product, whereas the grantee is funded to study a stated question as it sees fit and report its findings, whatever they may be. In actuality, however, these differences are more differences in form than substance, since the grantee is often required to develop and follow a detailed, exacting protocol. If the agency influences a grantee's data collection methods, the Office of Management and Budget (OMB) must approve the reporting form used by the grantee just as it does those of contractors.

From the standpoint of fair information practice, there is no compelling reason to differentiate between grantees and contractors, or between different classes of contractors if they all collect essentially the same sort of data and perform similar activities for similar research purposes. The important question is: does the Federal agency have the responsibility for the confidentiality of information disclosed to and collected by its contractors and grantees, or is the researcher solely responsible? The Commission's answer is that agencies have *de facto* responsibility for monitoring the performance of their contractors and grantees and that it makes them responsible for record confidentiality as well. To fix responsibility explicitly, however, the Commission recommends:

Recommendation (5):

That whenever a Federal agency provides, by contract or research grant, for the performance of any activity that results in the collection or maintenance of any record or information contained therein in individually identifiable form for a research or statistical purpose, the terms of such contract or research grant should:

- (a) **require the contractor or grantee to establish and maintain reasonable procedures to protect such record or information from unauthorized disclosure, including provision for removal or destruction of identifiers;**
- (b) **include rules for the disposition of such information or record upon termination of the contract or grant that provide appropriate protection against future unauthorized disclosure; and**
- (c) **make the contractor or grantee subject to the requirements of the most stringent applicable Federal and State statutes.**

Federal agencies have several alternative mechanisms for implementing *Recommendation (5)*. Contracts can specify safeguards or require agency approval of the contractor's safeguard procedures. An agency could simply require applicants to certify that they would protect the confidentiality of individually identifiable data and be liable if their performance fell below the agency's statutory standards. These alternatives obviously entail different levels of responsibility that the Commission is not prepared to assess. The Commission's concern is that Federal agencies take care to see that proper procedures are established and that grantees and contractors, in turn, are given clear responsibility for safeguarding the data under their

control. The Commission is also concerned that research organizations not be overburdened with a multiplicity of different implementation requirements, and urges that agencies standardize the safeguard procedures they require. The Office of Management and Budget should take the lead in seeing that this is done.

In addition to procedural safeguards, individually identifiable data need technical and administrative safeguards. When an agency publishes research and statistical data as anonymous microdata (that is, data in the form of individual records stripped of identification), it publishes detailed information about the characteristics of individuals and must take care to avoid publishing details that can identify individuals on the basis of unique characteristics or as members of an identifiable group.

There are various techniques for avoiding this which an agency can further develop and apply. Scholars in the field and professional associations, like the American Statistical Association, are paying considerable attention to the problem, as are agency task forces. An OMB task force, for example, is currently working on methodologies for protecting the identity of individuals in statistical reports.⁴

Techniques for minimizing identifiers or separating identifiers from responses include collecting the responses without names or under aliases; randomizing responses;⁵ or using face-sheets to be detached by a third party. After they are collected, information and records can be protected during maintenance and retrieval by techniques such as deleting identifiers; random error injection;⁶ and microaggregation.⁷ When data sets are interlinked, link-file brokerage⁸ can be used and direct linkage reestablished under statistical safeguards such as error injection or microaggregation; or by statistical matching; or file linkages can be mutually insulated. These techniques can be particularly useful in longitudinal studies,⁹ where the data must include identifiers.

Suppression and contamination techniques include eliminating small cells, collapsing classifications, and injecting random error. Many statistical agencies routinely use these techniques in screening data for publication.

⁴ Federal Committee on Statistical Methodology.

⁵ "Randomizing responses" is a process whereby the respondent is given two questions of which he selects one to answer on a random basis without revealing which question he answered. The researcher can estimate proportions through statistical methods that reflect the incidence of the response to the sensitive question in the population.

⁶ "Random error injection" is the inoculation of error into a report on a random basis but where the general character of the error is controlled by the researcher so that it is possible to estimate statistical parameters from a large sample even though it is not possible to tell if any given response is accurate.

⁷ "Microaggregation" is the process of creating many synthetic average persons and releasing data on those rather than on real individuals.

⁸ A "link-file system" is a system that maintains subject identifications in a file separate from the individual data file and which allows the linkage of subject identities and data about the individual in one or more files through codes that carry no individual identification. Brokerage refers to the maintenance of the link file by an unrelated third party whose sole function is to keep the identity of the record subject anonymous to the record collector and user.

⁹ A "longitudinal study" involves tracking a group of individuals over time to establish how the state of that group varies and the average relation between an individual's state in one point of time and his state at another point in time.

When the Bureau of the Census, for example, prepares tabulations and tapes for public use, it employs elaborate screening procedures, including the suppression of geographical identifiers and limiting the detail of small samples, to prevent disclosure of individual identities by way of cross-classifications.

All agencies and organizations that collect individually identifiable data for research and statistical purposes should continually strive to improve their techniques for minimizing the amount of identifiable information collected, removing identifiers as soon as possible after the data have been processed, and protecting the links between personal identifiers and the data in their files. To assist them, the Commission recommends:

Recommendation (6):

That the National Academy of Sciences, in conjunction with the relevant Federal agencies and scientific and professional organizations, be asked to develop and promote the use of statistical and procedural techniques to protect the anonymity of an individual who is the subject of any information or record collected or maintained for a research or statistical purpose.

CONDITIONS FOR USE OF INDIVIDUALLY IDENTIFIABLE RECORDS

The growing practice of making individually identifiable information available to the research community increases the risk of unauthorized use or inadvertent disclosure. To block this flow of information would paralyze a great many socially valuable research and statistical activities and increase the cost of the others. It would quickly increase the reporting burden on the public to intolerable proportions. The Commission's concern is neither to augment nor hinder the flow of individually identifiable information, but to establish safe limits to it.

Given the basic principle of functional separation and the recommended standards and procedural safeguards, the next issue is how to protect the individually identifiable information that was collected for other purposes when it is used for research and statistical purposes. When administrative records are made available for research and statistical uses, the principle of functional separation is as basic as in other flows of individually identifiable information and adequate safeguards and mechanisms for assuring accountability for the maintenance of confidentiality are equally essential.

Researchers and statisticians often request access to administrative records, and less often request access to previously collected or compiled research and statistical data. The two types of access requests must be considered separately because of the difference in the assumptions about confidentiality under which each is collected. The recommendations in this section are for modification in Federal agency disclosure practice with respect to these two kinds of requests, and for making contractors and

grantees more accountable for data security in disclosures both to and by them.

USE OF ADMINISTRATIVE RECORDS

Researchers and statisticians use administrative records in a variety of ways. One of the Bureau of the Census' duties is to study revenue sharing and voting rights, and for this it draws information from sources such as records of automobile registrations and births and deaths. Because administrative or program records cover all the individuals in a defined population, another important use of them is for drawing statistical samples from groups such as participants in a manpower training program, military personnel, hospital patients, veterans, Medicaid recipients, retired persons, taxpayers, or students. The Bureau of the Census, for example, draws from Internal Revenue Service (IRS) records the names and addresses of all taxpayers who report farm income. It uses this list to conduct its Census of Agriculture, mailing survey forms to everyone on the list, thus creating a new sampling frame.¹⁰ The Department of Defense draws samples from its own personnel records for surveys of military personnel characteristics and Armed Forces manpower potential.¹¹

Researchers also use the records of other programs to enrich the information in their own records. Different programs record different kinds of information about clients, so that matching records of different programs about a given sample made up of individuals who participate in all or some of them gives a more complete picture of the sample. The Department of Labor, for example, may give the Social Security Administration (SSA) its records on a sample of individuals who have completed manpower training programs to help the Department find out how manpower training affects the individuals' earning capacity.

A third research use of administrative records is in secondary analysis of research data. For example, the Bureau of the Census bases its studies of population migration on research records produced by its own surveys and censuses. If it decides to study commuting patterns of persons living in particular metropolitan areas, it would reanalyze its own research records to extract the necessary information for a new sample of individuals, but would need to update some particular items of information, such as residence or employer ZIP codes, from the more current records of some other agency. It might, therefore, request access to the administrative records on the individuals in its sample held by perhaps the IRS or the SSA.

REUSE OF RESEARCH AND STATISTICAL RECORDS

The arguments in favor of reusing research and statistical information and records in individually identifiable form for research and statistical

¹⁰ This exchange of information is described in detail in Appendix B to a U.S. Department of Commerce report entitled "The Use of Tax Data in the Structuring of Basic Economic Tools," November 4, 1974.

¹¹ Submission of Department of Defense, *Research and Statistics*, Hearings before the Privacy Protection Study Commission, January 5, 1971.

purposes are analogous to those for the use of administrative records for the same purposes. Secondary analysis of data sets can not only reduce the reporting burden on the public, but also can add new knowledge about social processes. It is also cumbersome, expensive, and in many cases impossible to replicate an already existing body of data. Moreover, secondary analysis of data can be a valuable verifier of findings originally derived from them. Finally, research and statistical information in individually identifiable form can be reused to match two or more data sets to gain more information than each singly provides, to draw samples, and to recontact individuals in the original sample for a longitudinal study of physical, social, or attitudinal change over time.

Nevertheless, the Commission urges caution. Here, as elsewhere, the flow of individually identifiable information can erode the public's willingness to cooperate voluntarily in data collection, and here, more than elsewhere, it is easy for researchers to forget the promises of confidentiality made to data subjects at the time information was collected.

The Commission believes that unless it is essential to recontact the individuals who took part in an earlier study, disclosure of information in individually identifiable form should be strictly limited to cases where public need clearly overrides private rights and then only after careful policy review of each case. This constraint need not unduly hamper research and statistical activities because, for the great bulk of them, anonymous microdata are as useful as individually identifiable data.

CONDITIONS FOR USE AND DISCLOSURE

A mosaic of statutory rules governs access to and disclosure of Federal agency records at present. The Federal Reports Act, designed primarily to minimize respondent burden, permits an agency to share information collected by other agencies, subject to certain constraints. It also minimizes duplication of effort by requiring the Office of Management and Budget (OMB) to review and approve the forms used in collecting information from individuals, whether the information is for program administration purposes or for research and statistical purposes. The OMB is also authorized to designate one agency as the sole collection agent for some types of information. The OMB has seldom exercised this authority, but recently used it to designate the Bureau of the Census as the sole collector of the population statistics needed for allocating some benefits such as revenue sharing.

Release of an agency's records is also governed by its own confidentiality statutes, if any, and by general statutes, such as the Privacy Act and the Freedom of Information Act. As noted above, however, a Federal agency can have substantial freedom to set its own threshold conditions for disclosing individually identifiable data from its records. Subsection 3(b)(1) of the Privacy Act permits disclosures within an agency on a need-to-know basis without reference to the original purpose of collection, and more than one executive department has arbitrarily broadened the resulting potential for circulation of data by defining itself as a single entity. Subsection 3(b)

allows disclosures for "routine uses" outside even those organizational boundaries. In general, an agency may not disclose records outside the agency except " . . . for a purpose which is compatible with the purpose for which . . . [they were] originally collected." [5 U.S.C. 552a(a)(7)] However, since the Act does not define "compatible," the office, bureau, center, or institute within the agency which actually maintains the records has a substantial latitude in deciding what purposes meet the test. In addition, the Freedom of Information Act may require an agency to comply with requests to disclose that it would refuse if it could.

In practice, agencies do not generally allow researchers and statisticians unrestricted access to their records. Some are tightly restrained from doing so by statute. The Bureau of the Census confidentiality statute, for example, permits only Bureau officials and employees to examine individual records. Other agencies interpret the Privacy Act compatibility test narrowly, while still others that have statutory discretion to do so often release data to their own contractors under the "routine use" provision of the Privacy Act. Only one agency appears to release individually identifiable data not only to its own grantees, but also to other researchers. Thus, the pool of researchers and statisticians who have in fact received individually identifiable information from Federal agencies is composed almost entirely of Federal agency employees, contractors, some grantees, and a relatively small number of people who have neither contracts nor grants. Even these groups do not ordinarily get full access to records. The typical disclosure is a sample list of names and addresses. An agency's disclosure problems are complicated by the fact that it can sponsor research by contract or by grant.¹² Most agencies follow different disclosure policies depending upon whether the request for information comes from a contractor or a grantee but, as noted above, that simple distinction is not always valid as far as fair information practices are concerned.

Whenever an agency discloses individually identifiable information under the Privacy Act's "routine use" provision to a researcher whose procedures it controls, the funding instrument should contain safeguards for the released information, and these should be the same whether the request is from a contractor or a grantee. In practice, agencies differ in the safeguards they require in these cases. At the completion of the research project, for example, some contracts explicitly require that all identifiers be expunged from the records retained, others require that all data be returned to the agency, and some remain silent on this point. There are, in short, numerous ambiguities in the way disclosures of individually identifiable information are now regulated. If the research community is to have access to already existing individually identifiable information without endangering the privacy of data subjects, these ambiguities will have to be cleared up, and the conditions of disclosure made more explicit.

The Commission is well aware that opinions vary widely on how important given research endeavors are to society, and hence, how much

¹² It must be noted that the grants discussed here are Federal discretionary grants, not formula or block grants, which involve Federal-State issues beyond the scope of these recommendations.

disclosure is warranted in any instance. Nonetheless, there are minimum conditions that should be met before any disclosure or use of individually identifiable records for research and statistical purposes is permitted, and these conditions should be set by statute. First, the applicant must demonstrate a vital need for individually identifiable data to achieve its proposed research or statistical purpose. Second, in assuring responsibility for maintaining proper safeguards, a responsibility obviously shared by both the applicant for and the provider of information, the Commission believes that the provider of information has the prime obligation for assuring that the conditions of disclosure are met by the receiving body. The provider can meet this obligation by stipulating the conditions for releasing the information and requiring the receiver to agree in writing to honor them, subject to criminal or other sanctions. In all cases, the user should be accountable to the agency responsible for the collection of the data. In addition, if the research purposes include recontact of data subjects, protection of the expectation of confidentiality under which the information was originally collected should be made a condition of disclosure.

Therefore, the Commission recommends:

Recommendation (7):

That unless prohibited by Federal statute, a Federal agency may be permitted to use or disclose in individually identifiable form for a research or statistical purpose any record or information it collects or maintains without the authorization of the individual to whom such record or information pertains only when the agency:

- (a) determines that such use or disclosure does not violate any limitations under which the record or information was collected;**
- (b) ascertains that use or disclosure in individually identifiable form is necessary to accomplish the research or statistical purpose for which use or disclosure is to be made;**
- (c) determines that the research or statistical purpose for which any disclosure is to be made is such as to warrant risk to the individual from additional exposure of the record or information;**
- (d) requires that reasonable procedures to protect the record or information from unauthorized disclosure be established and maintained by the user or recipient, including a program for removal or destruction of identifiers;**
- (e) prohibits any further use or redisclosure of the record or information in individually identifiable form without its express authorization; and**
- (f) makes any disclosure pursuant to a written agreement with the proposed recipient which attests to all the above, and which makes the recipient subject to any sanctions applicable to agency employees.**

The above recommendation holds the disclosing agency accountable

for assuring that the individually identifiable information it releases for research and statistical purposes is used responsibly. This presents no problem when an agency discloses information to a contractor or grantee supported by the agency itself. The situation is more complex when a contractor or grantee funded by one agency needs access to information maintained by another agency. To clarify the chain of accountability in these instances, disclosure should be contingent on an agreement by the agency funding the research or statistical activity to take prime responsibility for assuring that the user satisfies the conditions under which the information is released. Therefore, the Commission recommends:

Recommendation (8):

That when disclosure pursuant to *Recommendation (7)* is made to a Federal contractor or grantee, the written agreement should be between the disclosing agency and funding agency, with the latter responsible for assuring that the terms of the agreement are met.

Recommendations (7) and (8) are designed to regulate disclosure by Federal agencies, but can be applied as well to Federal contractors and grantees when they are asked to disclose individually identifiable information. Under existing law, individually identifiable information collected by grantees is not subject to the provisions of the Privacy Act. The granting agency may require safeguards for such information, but any obligation to do so is a matter of administrative policy or regulation.

Individually identifiable information collected by contractors in performance of their work for an agency is also not necessarily subject to the Privacy Act. The Privacy Act states:

When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system . . . [5 U.S.C. 552a(m)]

Some agencies interpret this clause to mean that contractors may not collect information about individuals under conditions that are less confidential than the conditions applying to records maintained by the agency itself. In a May 1976 memorandum, however, the General Counsel of DHEW interpreted it to mean that, in performing this kind of work, contractors are comparable to grantees, and that

. . . the requirements of the Privacy Act of 1974 are not applicable to HEW research and other contracts which call for the contractor merely to furnish to the HEW contracting agency statistical or

other reports, even though it is necessary for the contractor to establish a system of records to perform the contract.¹³

Although contractor records compiled under these conditions are not thought to be subject to the Privacy Act, the memo advises DHEW contracting officers to incorporate into contracts, where appropriate, "... the provisions designed to protect the confidentiality of the records and the privacy of individual identifiers in the records."

These differences in agency interpretation of obligations under the Privacy Act, and the lack of any explicit policy concerning the protection of individually identifiable data collected under a grant, make for a less than satisfactory disclosure situation. This is especially true since, as noted before, the agencies' existing disclosure policies are complicated by differing confidentiality provisions in statutes and the several methods of procuring research. Yet, where individually identifiable information is collected and maintained as a consequence of Federal funding, there is a corresponding obligation on the part of the Federal government to maintain accountability to the individual. Individually identifiable information held by a contractor or grantee should be disclosed only when the recipient can be held accountable for any violation of the individual's right to have identifiable data about him shielded from improper use or disclosure. For this, an additional accountability mechanism is necessary and the Commission, therefore, recommends:

Recommendation (9):

That any person, who under Federal contract or grant collects or maintains any record or information contained therein for a research or statistical purpose, be prohibited from disclosing such record or information in individually identifiable form for another research or statistical purpose, except pursuant to a written agreement that meets the specifications of *Recommendations (7) and (8)* above, and has been approved by the Federal funding agency.

PROTECTIONS TO BE INVOKED BY THE INDIVIDUAL

Once individually identifiable research and statistical data are insulated from all other types of use by adequate safeguards and standards of accountability, there remains only the question of what the individual can do for his own protection, or have done on his behalf. Specifically, the following questions about the role of the individual need to be answered.

- When should the individual's authorization to gather or disclose information about him be necessary?
- What constitutes adequate notice to the individual of the level

¹³ Memorandum from General Counsel William H. Taft III to John Ottina, Assistant Secretary for Administration and Management, Department of Health, Education, and Welfare, regarding the application of the Privacy Act to DHEW contractors, May 14, 1976.

of confidentiality an agency or organization expects to maintain?

- What constitutes adequate notice to the individual that the information he supplies for administrative purposes may also be used for a research or statistical purpose?
- Under what conditions should the individual be allowed access to research and statistical records pertaining to himself?

These questions reveal important differences between information collected directly from the individual for a research or statistical purpose and information extracted from administrative records for the same purpose. It may be useful to begin by examining the individual's role as prescribed by the Privacy Act of 1974, and then to consider whether the same role for the individual will suffice when the information is for research or statistical use.

A goal of the Privacy Act is to permit an individual to monitor an agency's collection, use, and dissemination practices with respect to information about him in its possession by giving him access to the information about him in agency files, and an opportunity to challenge errors. In addition, the Privacy Act specifies that the individual has the right to learn of disclosures to others, with a few significant exceptions (i.e., internal agency uses, disclosures made pursuant to the requirements of the Freedom of Information Act, and disclosures to law enforcement agencies). The Privacy Act's main mechanisms for giving the individual some control over government *use* of the information it collects about him are notice and authorization. At the time information is collected from an individual he must be notified of the authority under which it is being collected and whether his response is mandatory or voluntary, and also of the purposes for collecting the information and the uses to which it will be put. He must also be told the consequences of not supplying the information. [5 U.S.C. 552a(e)(3)] The agencies must give public notice annually of their existing record systems, [5 U.S.C. 552a(e)(4)] although the OMB guidelines have modified this requirement so that after an agency has published its initial list of record systems it need only report any new ones or any changes in existing systems. An agency must advise an individual, on request, if it maintains any records on him and, on request, allow him to examine the records on him and challenge their accuracy. [5 U.S.C. 552a(d)] The record of an individual may not be used for purposes other than those for which it was collected without the individual's consent except as expressly authorized by any one of the 11 exceptions in the Privacy Act. [5 U.S.C. 552a(b)] One such exception, as noted earlier, is for a "routine use," which, being open to interpretation, diminishes the efficacy of the Act's authorization requirements.

Notice and authorization work together, but not in the same way. Generally speaking, the intent of the Privacy Act notice requirements is to assure that the individual, knowing in advance the purpose for which the information is collected and what uses may be made of it, can refuse to cooperate if his participation is voluntary, or challenge the questioner's

authority if it is not. The Privacy Act assumes that any reasonable individual will expect that the information he contributes may be disclosed for auditing use, or in response to court order or legislative inquiry, or for tax and other law enforcement purposes. The assumption, however, is seldom justified when information is collected for a research or statistical purpose. It is not reasonable to expect the subject to know that the data he supplies for a research or statistical purpose may be disclosed in response to compulsory process or may enter into an administrative decision pertaining to him. Thus, unless there is functional separation of research and statistical uses of information from administrative uses, the notice requirements of the Privacy Act are clearly inadequate.

Assuming that functional separation can be established as recommended by the Commission, the question of how much control the individual should have over how information pertaining to him is used in research or statistical activities remains, as well as the question of how that control should be exercised.

INFORMATION COLLECTED FOR RESEARCH AND STATISTICAL PURPOSES

Individually identifiable data about individuals flow into research and statistical record systems, as into other record systems, from several sources. Some is obtained directly from individuals by means of questionnaires, interviews, and other methods of systematic inquiry, such as controlled experiments, sometimes with the individual's full knowledge and sometimes without it. For example, data are sometimes collected from persons not fully competent to understand the collection process, while other information is extracted from administrative or program records, or supplied by third parties.

In considering an individual's control over information about him when it is used for research and statistical purposes, the important distinction is between the information researchers and statisticians get from him directly and that which they get from him indirectly by culling it from administrative files. The distinction is important because of the difference in the individual's expectation of confidentiality. When asked to contribute information for administrative purposes, he can reasonably expect that his contribution will enter into administrative decisions about him and act accordingly, but when asked to contribute it for research or statistical purposes, he is not likely to anticipate any uses other than the ones stated by the questioner.

When an individual is asked to provide information for a research or statistical purpose, he should, in all fairness, have a reasonable idea of the consequences to him of agreeing or of refusing to answer. Minimally, this means he must be told that he can refuse if he chooses, and informed of the purpose and nature of the data collection, and the extent to which the information he supplies will be disclosed further in individually identifiable

form. Accordingly, as a supplement to notice requirements already embodied in the Privacy Act¹⁴ the Commission recommends:

Recommendation (10):

That absent an explicit statutory requirement to the contrary, any Federal agency that collects or supports the collection of individually identifiable information from an individual for a research or statistical purpose be required by Federal statute to notify such individual:

- (a) of the possibility, if any, that the information may be used or disclosed in individually identifiable form for additional research or statistical purposes;**
- (b) of any requirements for disclosure in individually identifiable form for purposes other than research and statistical use; and**
- (c) that if any such required disclosure is made for other than a research or statistical purpose, he will be promptly notified.**

Some research involves children or people of diminished mental competence; other research involves population groups, such as prisoners, whose circumstances compromise their freedom to choose whether or not to participate. There are also research experiments so designed that the validity of the findings depends on the participants' ignorance of some aspects of the research, and sometimes even of the fact that they are participating in research. To create special protection for such data subjects, the Commission recommends an institutional review process. The Commission recognizes the difficulty of creating institutional review boards where they do not now exist, and holding a Federal agency accountable for the actions of those collecting information for research or statistical activities on its behalf as well as for its own actions. The Commission's intent is not to specify how institutional review is to be established, but rather to make the point that the safeguards that enable an individual to protect himself must be applied to the individual who, for one reason or another, cannot take advantage of them on his own initiative. Accordingly, the Commission recommends:

Recommendation (11):

That Congress provide by statute that when information about an individual is to be collected in individually identifiable form for a research or statistical purpose by a Federal agency or with Federal funding, an institutional review process be required to apply the principles enunciated in *Recommendation (10)* in order to protect the individual:

- (a) who is not competent to give informed consent to provide information about himself (e.g., a minor or mentally incompetent individual);**

¹⁴ The Privacy Act already requires that an individual be told whether his participation is mandatory or voluntary and the purposes and nature of the data collection. [5 U.S.C. 552a(e)(3)]

- (b) whose consent may be seriously compromised by fear of some loss of benefit or imposition of sanction (e.g., "captive populations," such as students, welfare recipients, employees, prison inmates, or hospital patients);
- (c) when the ability to conduct statistical or research activity is predicated on the individual being unaware of its existence, purpose, or specific nature.

In this context, the Commission observes that although its mandate is confined to protecting the interests of research subjects with respect to information and records about them generated by research and statistical methods, its broad concern is with protecting the more general rights and welfare of human research subjects. The Department of Health, Education, and Welfare, as the Federal agency sponsoring the bulk of such research, has, since 1966, taken the lead in this area by issuing guidelines and regulations setting conditions designed to control research on human subjects. Recent action by the Congress, furthermore, portends even wider ramifications. For example, the National Research Act of 1974 [P.L. 93-348] establishes a National Commission for the Protection of Human Subjects in Biomedical and Behavioral Science Research (NCPHS) with a mandate to define the ethical principles of such research and recommend policies for assuring that the research does not violate ethical principles in practice. Among other things, the National Research Act provides for making the NCPHS recommendations applicable to all Federal agencies, and for establishing a National Advisory Council to monitor the protection of human subjects after the NCPHS completes its task.

The DHEW regulatory activities to protect human research subjects have focused on the institutional responsibility of the organization that actually conducts the research. Under current policy, no DHEW extramural research involving human subjects may be undertaken unless a committee known as an institutional ethical review board has assured DHEW that it has reviewed the proposed research design and determined whether human subjects will be placed at risk, and if so, that: the risks are outweighed by the sum of the benefits to the individual and the importance of the knowledge to be gained; the rights and welfare of the subjects will be adequately protected; legally effective informed consent will be obtained from each participant; and the conduct of the research will be reviewed at timely intervals.

The NCPHS does not expect to issue its final recommendations until the end of 1977. It is already clear, however, that institutional review committees will continue to have the prime responsibility for protecting human subjects. Consequently, where institutional ethical review boards do not already exist pursuant to DHEW regulations, there is every likelihood that they will soon be established pursuant to recommendations of the NCPHS. When this happens, the existing boards and the newly created ones will provide a suitable vehicle for carrying out *Recommendation (11)*.

INFORMATION COLLECTED FROM ADMINISTRATIVE RECORDS

From the standpoint of protecting the individual, the two most pertinent questions about the use for a research or statistical purpose of individually identifiable information drawn from administrative or other records are: whether information ostensibly collected for administrative purposes is actually being collected for research and statistical purposes without the individual's authorization; and whether delivery of program or other benefits should be contingent on the individual's willingness to have administrative information about him also used for a research or statistical purpose?

With respect to the first question, the Commission believes that while research and statistical "piggy-backing" on administrative data collections does perhaps occur more often than necessary, the measures recommended by the Commission will protect the individual from having additional information generated by research activities used to his detriment. The first question will then be less important than it is now.

The second question presents a more difficult problem, since the answer depends on balancing the individual's right to control the collection and use of information pertaining to him against the society's need for knowledge. The preceding recommendations recognize the societal utility of information generated by research and statistical activities, and the extent to which the continuing productivity of these activities depends on access to administrative records by allowing individually identifiable data in administrative records to be disclosed for research or statistical purposes under appropriate safeguards.

Additional protections for the individual about whom information in administrative records is used for a research or statistical purpose are not necessary because the measures in the preceding recommendations will be adequate. Research and statistical activities can safely be spared the costly burden of obtaining the authorization of each individual if adequate notice is given when the information is collected for administrative records in the first place. The individual will then realize that the information he supplies for administrative purposes may also be used for research or statistical purposes, and that he may be contacted by a researcher. Accordingly, the Commission recommends:

Recommendation (12):

That Congress provide by statute that when individually identifiable information is collected from an individual by a Federal agency or with Federal funding for a purpose other than a research or statistical one, the individual be informed that:

- (a) **such information may be used or disclosed in individually identifiable form for a research or statistical purpose, with appropriate safeguards;**
- (b) **that he may be recontacted as a result of such use or disclosure.**

INDIVIDUAL ACCESS TO RESEARCH AND STATISTICAL RECORDS

The right given an individual by the Privacy Act to see and copy a record maintained about him and to challenge the information in the record recognizes that the individual has a role to play in decision-making processes that affect him. Records that are dedicated by statute solely to research or statistical use may be exempted from the general right of access and challenge because, unlike administrative records, they are not used for making decisions about individuals. If information in research or statistical records cannot be disclosed in individually identifiable form for any other purpose, the individual need have no great concern about it. Unless such records can be totally protected against the possibility that individually identifiable information in them will be disclosed for any other purpose, the individual's concern is obvious and his access right highly relevant.

Two points are important. First, it is important for the individual to retain a measure of control over individually identifiable research or statistical information pertaining to him because he needs some way of finding out who else gets the information. Second, whether an individual needs to have access to records maintained about him for research or statistical purposes depends on how well these records can be kept separate from other uses. If separation is not maintained, and the information is in fact disclosed in individually identifiable form for other than a research or statistical use without a guarantee that the disclosure will not affect the individual, fairness demands that the individual be informed of the disclosure and to whom it was made, and be given a right of access to the record. Accordingly, the Commission recommends:

Recommendation (13):

That Congress provide by statute that if any record or information contained therein collected or maintained by a Federal agency or with Federal funding for a research or statistical purpose is disclosed in individually identifiable form without an assurance that such record or information will not be used to make any decision or take an action directly affecting the individual to whom it pertains (e.g., to a court or an audit agency), or without a prohibition on further use or disclosure, the individual should be notified of the disclosure and of his right of access both to his record and to any accounting of its disclosure.¹⁵

IMPLEMENTATION STRATEGY

No single vehicle is adequate to carry out all of the Commission's recommendations in this chapter. Thus, the Commission has chosen a strategy which encompasses amendments to the Privacy Act of 1974, other legislative action, and voluntary compliance on the part of national study organizations.

¹⁵ The Privacy Act already requires an accounting of such disclosures. [5 U.S.C. 552a(c)]

The Commission feels that the principle of functional separation (*Recommendation (1)*) can be established by amending the Privacy Act.¹⁶ The first set of steps necessary to apply that principle to Federal and federally assisted research, namely, establishing appropriate uses and disclosures for research and statistical records (*Recommendations (2) and (3)*) can best be implemented through a new Federal statute to provide a common line of minimum protection for the confidentiality of Federal or federally assisted research and statistical records.

The second set of steps necessary to apply the principle of functional separation—namely, establishing procedures for protecting the confidentiality of individually identifiable data—seeks to establish a consistent set of safeguards among Federal agencies and their contractors and grantees. *Recommendations (4) and (5)*, which would achieve this objective, can be implemented through amendment of the Privacy Act. In addition, the Commission believes that new techniques for collecting, maintaining, and using records about individuals in ways that avoid personal identification ought to be developed and promulgated, and, therefore, recommends that the National Academy of Sciences voluntarily take the lead in doing so.

The third set of recommended steps, establishing the conditions of disclosure for individually identifiable information to be used for a research or statistical purpose, seeks to assure that a common set of conditions are met in a consistent and accountable way by Federal agencies and their contractors and grantees (*Recommendations (7), (8), and (9)*). These recommendations can be implemented through amendments to the Privacy Act of 1974 which currently sets minimum conditions for the use and disclosure of Federal records.

Recommendations (10) through (13) address the role of the individual in protecting himself and focus on notice and access. *Recommendations (10), (11), and (12)* which deal with notice, and *Recommendation (13)*, which deals with access, can best be implemented through amendment to the Privacy Act. As pointed out in the earlier discussion of *Recommendation (11)*, however, the Commission did not specify how the institutional review the recommendation would require should be established or what the required steps in the review process should be. The Commission urges that the National Commission for the Protection of Human Subjects in Biomedical and Behavioral Research incorporate *Recommendation (11)* into the mandate of the institutional review process it will recommend for all Federal agencies and also that Federal agency regulations implementing the Privacy Act incorporate the National Commission's recommendations.

POLICY GUIDELINES

The 13 recommendations in this chapter collectively provide a means of protecting personal privacy in research and statistical activities conducted or sponsored by the Federal government. The Commission's findings lead it to present for consideration to other research communities the following nine policy guidelines which it hopes will be voluntarily adopted by all those

¹⁶ See Note 2, Chapter 13.

who conduct research and statistical activities. The Commission also believes that they could help to shape any State legislation in the field. The fundamental principle for the guidelines, as for the recommendations in the previous sections of this chapter, is that of functional separation—insulating the use of individually identifiable information for research and statistical purposes from all other uses. These guidelines follow the precepts in the Commission's recommendations.

Guideline (1):

Any record or information contained therein collected or maintained for a research or statistical purpose should not be used in individually identifiable form to make any decision or take any action directly affecting the individual to whom the record pertains, except within the context of the research plan or protocol, or with the specific authorization of such individual; and

That based on the foregoing principle, a special set of information practice requirements should be established for records and information contained therein collected or maintained in individually identifiable form for a research or statistical purpose.

Great care is needed to protect individually identifiable information from unauthorized or inadvertent disclosure. The Commission is persuaded not only that full technical, administrative, and physical safeguards must be established to protect confidentiality, but also that information should be rendered anonymous by being stripped of identifiers as soon after collection as possible.

Guideline (2):

Any entity that, for a research or statistical purpose, collects or maintains in individually identifiable form any record or information contained therein should be required:

- (a) to establish and maintain adequate safeguards to protect such record or information from unauthorized disclosure; and**
- (b) to maintain such record or information in individually identifiable form only so long as is necessary to fulfill the research or statistical purpose for which it was collected, unless the entity can demonstrate that there are reasons for retaining the ability to identify the individual to whom the record or information pertains which outweigh the increase in the risks to the individual of exposure of the record.**

Once the principle of functional separation is accepted, and adequate mechanisms for implementing it are in place, individually identifiable information can safely be disclosed for research and statistical purposes provided certain minimal conditions are met.

Guideline (3):

Except where specifically prohibited by law, an entity that collects or maintains a record or information may use or disclose in individually identifiable form either the record or the information contained therein for a research or statistical purpose without the consent of the individual to whom the record pertains, provided that the entity:

- (a) determines that such use or disclosure does not violate any limitations under which the record or information was collected;**
- (b) ascertains that use or disclosure in individually identifiable form is necessary to accomplish the research or statistical purpose for which use or disclosure is to be made;**
- (c) determines that the research or statistical purpose for which any disclosure is to be made is of sufficient social benefit to warrant the increase in the risk to the individual of exposure of the record or information;**
- (d) requires that adequate safeguards to protect the record or information from unauthorized disclosure be established and maintained by the user or recipient, including a program for removal or destruction of identifiers; and**
- (e) prohibits any further use or redisclosure of the record or information in individually identifiable form without its express authorization.**

The remaining six guidelines are for the further protection of individual data subjects from unfair collection practices, and to assure individual access whenever the principle of functional separation cannot be upheld.

The Commission believes it advisable that the fair information practice principles established by the Privacy Act of 1974, and supplemented by *Recommendation (10)* above, be extended to include individuals who supply information for research and statistical activities that are independent of the Federal government.

Guideline (4):

Absent an explicit statutory requirement to the contrary, no individual should be required to divulge information about himself for a research or statistical purpose. To assure that there is no coercion or deception, the individual should be informed:

- (a) that his participation is at all times voluntary;**
- (b) of the purposes and nature of the data collection;**
- (c) of the possibility, if any, that the information may be used or disclosed in individually identifiable form for additional research or statistical purposes;**
- (d) of any requirements for disclosure in individually identifiable form required for purposes other than research and statistical use; and**

- (e) that if any such required disclosure is made for other than a research or statistical purpose, he will be promptly notified.

Individuals whose consent to participate in a research or statistical project cannot be given because of youth or disability or because the research design precludes it, and individuals whose circumstances coerce their participation need extra protection.

Guideline (5):

When information about an individual is to be collected in individually identifiable form for a research or statistical purpose, an institutional review process or responsible representative should be required to apply the principles enunciated in *Guideline (4)* in order to protect the individual:

- (a) who is not competent to give informed consent to provide information about himself (e.g., a minor or mentally incompetent individual);
- (b) whose consent may be seriously compromised by fear of some loss of benefit or imposition of sanction (e.g., "captive populations" such as students, welfare recipients, employees, prison inmates, or hospital patients); or
- (c) when the ability to conduct statistical or research activity is predicated on the individual being unaware of its existence, purpose, or specific nature.

When individually identifiable information collected in the first instance for some other purpose is used for research and statistical purposes, it needs special attention.

Guideline (6):

When individually identifiable information is collected for a purpose other than a research or statistical purpose the individual should be informed:

- (a) that such information may be used or disclosed in individually identifiable form for a research or statistical purpose, with appropriate safeguards; and
- (b) that he may be recontacted as a result of such use or disclosure.

So long as all individually identifiable information used for research and statistical purposes is kept separate from use for any other purpose, the individual data subject does not need access to the record. When the information cannot be protected from use for other purposes, the individual should have a right of access.

Guideline (7):

When research or statistical records or information are collected and

maintained in conformity with all the foregoing policy recommendations, an individual should have a right of access to a record or information which pertains to him if such record or information is used or disclosed in individually identifiable form for any purpose other than a research or statistical one (e.g., an inadvertent unauthorized disclosure).

Fairness demands that individuals have a way of finding out, if they wish, what disclosures of individually identifiable information about them have been made.

Guideline (8):

Any entity that collects or maintains a record or information for a research or statistical purpose should be required to keep an accurate accounting of all disclosures in individually identifiable form of such record or information contained therein such that an individual who is the subject of such record or information can find out that the disclosure has been made and to whom.

The importance to an individual of access to information used for research and statistical purposes depends on the extent to which the information can be kept separate from use for other purposes.

Guideline (9):

If any record or information contained therein collected or maintained for a research or statistical purpose is disclosed in individually identifiable form without an assurance that such record or information will not be used to make any decision or take an action directly affecting the individual to whom it pertains, or without a prohibition on further use or disclosure (e.g., to a court or an audit agency), the individual should be notified of the disclosure, and of his right of access to the record and to the accounting for its disclosure, as provided by *Guidelines (7) and (8)* above.